electricity prices.[1] Indeed, perhaps not since the energy crises of the 1970s has the wisdom been so apparent of Congress's goal, through enactment of the Public Utility Regulatory Policies Act of 1978 (PURPA), to encourage and diversify domestic energy production.

PURPA was designed to create a market for non-traditional generation of electricity. It does so by requiring that, when public utilities identify the need for future electricity generation, they must accept offers from a federally-qualified, non-traditional facility (QF) if that QF demonstrates its ability to meet the utility's projected needs at the same or lower price than the utility's other sources. PURPA relies on States to implement the regulatory program it established.

This case involves a new interpretation by the Public Utility Commission of Texas of a state rule that defeats the goal of PURPA. The Texas rule allows a utility to disregard any offer from a QF to meet the utility's projected needs, until 90 days prior to the QF's ability to supply electricity. Thus, under the Texas rule, the QF must already have been financed and built without any prior commitment from a utility to purchase its electricity. The result of the Texas rule is that a utility will never be obligated to purchase from an unbuilt QF because no new facility can be constructed and capable of providing electricity within 90 days. Further, a QF can be built only if there is investment to support construction, but there

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[1] The average retail price of electricity rose to record levels in 2005, due in significant part to record prices for coal and natural gas. *See* Energy Info. Admin., U.S. Dep't of Energy, *Electric Power Annual 2004* (Nov. 2005), *available at* http://www.eia.doe.gov/cneaf/electricity/epa/epa_sum.html (describing events causing record high prices experienced in 2004); Energy Info. Admin., U.S. Dep't of Energy, *Electric Power Monthly* (Jan. 11, 2006), *available at* http://www.eia.doe.gov/cneaf/electricity/epm/epm_sum.html (reporting that retail prices as of October 2005 continued to outpace 2004 prices by an average of 5.5%).

will be no investment if there is no advance commitment for purchase of electricity by a utility in the future at a specified rate. At the same time, a utility cannot wait until 90 days before it actually needs additional electricity to lock in a commitment to obtain it. Therefore, under the Texas 90-day rule, a utility necessarily will have to commit to construct its own facility to meet its future need for additional capacity or commit to purchase it elsewhere. Once that commitment is made the QF no longer has any chance to enforce a utility's obligation under PURPA to purchase at any price greater than zero. That is because PURPA grants QFs a right to a price that reflects the substitution of the QF for other future utility generation to which the utility otherwise would have been required to commit, *i.e.*, the cost that the utility would "avoid" incurring by instead buying from the QF. Under the Texas rule, a utility's "avoided" cost always would be zero because the utility, in fact, will already have constructed a new plant or legally committed to pay another source for the electricity that the QF could have provided.

The court of appeals failed to hold that such a rule, which frustrates the central purpose of PURPA and its regulations, is preempted by federal law, whereas other circuits would have undertaken such a frustration-of-purpose analysis and reached a different result. Absent review of this case, PURPA will be weakened at a time when its need has again become manifest, and the persistent unwillingness of some lower courts to find state laws preempted when they frustrate the purpose of a federal statutory scheme will continue unabated.

STATEMENT OF THE CASE

A. The Statutory and Regulatory Framework of PURPA

This case involves Title II of PURPA, Pub. L. No. 95-617, 92 Stat. 3117, codified in part at 16 U.S.C. § 824a-3. Congress enacted PURPA specifically to decrease this

Nation's reliance on foreign oil. PURPA encourages development of non-traditional cogeneration and small power production facilities as an alternative to electric utility facilities, which were excessively dependent on traditional fossil fuels and foreign imports. *See FERC v. Mississippi*, 456 U.S. 742, 750 (1982). "Cogeneration" refers to the process of producing electricity and some other form of useful energy that is used sequentially, such as heat or steam, "for industrial, commercial, heating, or cooling purposes." 16 U.S.C. § 796(18)(A); 18 C.F.R. § 292.202(c). A "wide variety of technologies are used in cogeneration and small power production, including internal combustion engines, steam turbines, combustion turbines, windmills, solar cells, and hydro turbines." *American Paper Inst. Inc. v. American Elec. Power Serv. Co.*, 461 U.S. 402, 416 (1983).

Congress recognized that the general reluctance of electric utilities to purchase power from non-traditional cogeneration and small facilities was a significant obstacle to the investment in and construction of these facilities. *See FERC v. Mississippi*, 456 U.S. at 750-751. To address this problem, Congress created a market for electricity generated from non-traditional facilities by requiring FERC to establish regulations mandating that electric utilities must "offer to * * * purchase electric energy" from cogeneration facilities and small power producers that meet the requirements to be a "qualifying facility," or "QF." 16 U.S.C. § 824a-3(a); 18 C.F.R. § 292.203(a).[2]

To address the concern that such mandated purchases from QFs might raise the cost to consumers, PURPA requires that the purchase rates that a utility can pay to a QF must not exceed a utility's full "avoided" cost. 16

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[2] A QF must satisfy certain criteria regarding, for example, ownership (ownership by a utility is prohibited), size restrictions in some instances, and efficiency standards. 16 U.S.C. § 796(17), (18); 18 C.F.R. §§ 292.203-292.206.

U.S.C. § 824a-3(b) & (d); 18 C.F.R. § 292.304(b)(2).[3] That avoided cost rule ensures that ratepayers are, at the least, indifferent to QF purchases because the rate paid to a QF will not exceed (and will often be less than) the cost that the utility would otherwise incur by providing the same amount of electricity itself, either through its own generation or purchase from another source. Because the maximum rates paid to QFs are to be based on future costs that a utility would "avoid" by not having to build its own plant or purchase from another source, FERC recognized that the QF would need to be able to obtain a purchase commitment from a utility *before* the utility actually committed to building its own power plant or purchasing from another source, and in sufficient time for the QF to obtain financing and to construct the non-traditional facility. *See* 45 Fed. Reg. 12,214, 12,224 (1980). For obvious reasons, this necessary lead time – to allow planning, financing, and construction – exceeds 90 days.

FERC's implementing regulations provide that the rate for purchasing QF electricity may be part of a contract between a utility and a QF. 18 C.F.R. § 292.301(b)(1). FERC recognized, however, that recalcitrant utilities could attempt to circumvent their obligations to purchase from QFs "merely by refusing to enter into a contract with the qualifying facility." 45 Fed. Reg. at 12,224. Thus, FERC regulations permit QFs to "lock in" a rate calculation at the time that a "legally enforceable obligation" (LEO) arises, without a fully-negotiated bilateral contract with the utility. *Ibid.* A LEO arises "where the qualifying facility has agreed to obligate itself to deliver at a future date the energy and capacity to the electric utility." *Ibid.* A QF has the option to have the purchase rate calculated *either* at the time a LEO is

[3] "Avoided" cost is the incremental cost to a utility of electric energy which, but for the purchase from a QF or QFs, the utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6).

established *or* later when the QF delivers the electricity to the utility. 18 C.F.R. § 292.304(d)(2).

Allowing a QF to lock in a purchase rate when a LEO is established allows the QF the certainty of a purchase rate prior to construction of a physical plant. *See* 45 Fed. Reg. at 12,224 (giving a QF the ability to lock in a purchase rate at the time when a LEO is incurred "ensure[s] the certainty of rate for purchases from a qualifying facility which enters into a commitment to deliver energy or capacity to a utility"). FERC determined that QFs need such rate certainty "before construction of a facility" because "the price at which the qualifying facility can sell its electric output" will determine "the expected return on a potential investment" and thus "the financial feasibility of" a QF to investors. *Id.* at 12,218; *see also id.* at 12,224 (FERC explaining the "need for certainty with regard to return on investment in new technologies").

B. The Texas Public Utility Commission Rule at Issue

PURPA relies on state public utility commissions to implement the federal mandatory purchase obligation. Section 210(f)(1) requires that "each State regulatory authority shall * * * implement" the rules adopted by FERC "for each electric utility for which it has ratemaking authority." 16 U.S.C. § 824a-3(f)(1). FERC's rules establish the regulatory framework that must be applied and afford state regulatory authorities "latitude in determining the *manner* of implementation of the Commission's rules." 45 Fed. Reg. at 12,230-12,231 (emphasis added). "Thus, a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." *FERC v. Mississippi*, 456 U.S. at 751. The latitude afforded to the States in the manner of compliance, however, does not negate the States' duty to enforce the Act's mandatory purchase obligation.

Respondent Public Utility Commission of Texas (PUC) promulgated substantive rules in an effort to comply with the federal directive to implement PURPA and the FERC regulations. The rule at issue in this case – Texas PUC Substantive Rule 25.242(f)(1)(B) – purports to implement, *inter alia*, FERC regulation 18 C.F.R. § 292.303(a), as it relates to a utility's obligation to purchase electricity from QFs as of the time of a LEO.[4] Under the PUC's interpretation of its rule established for the first time in the state administrative proceeding involving petitioner's QF, the utility is not required to contract, and a QF cannot establish a LEO in the absence of a contract, until 90 days prior to the QF's ability to deliver electricity to the utility. App., *infra*, 57a. This interpretation thus eliminates the QF's ability to displace future capacity needs of the utility because the capacity already would have been constructed by the utility, itself, or committed elsewhere by the time the 90-day period commences, thereby eviscerating the mandatory purchase obligation which goes to the heart of PURPA. The PUC highlighted the consequences of this interpretation in a subsequent proceeding involving wind power:

> the utility [is] not obligated to purchase cogeneration energy or capacity from the potential seller until the QF [is] able to provide energy within 90 days after notifying the utility that the cogeneration energy or capacity would be available.

Final Order, *Great Plains Windpower, LLC*, No. 29218, 2004 Tex. PUC LEXIS 27, at *4 (Aug. 30, 2004).

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[4] When petitioner first sought relief from the PUC, the rule was codified as Substantive Rule 23.66. App., *infra*, 57a. The rule was subsequently recodified, with immaterial amendments, as Substantive Rule 25.242. App., *infra*, 18a n.2.

C. Factual and Procedural Background

1. In 1995, respondent Texas-New Mexico Power Company (TNMP), a public electric utility under the ratemaking authority of the PUC, determined what electricity needs it anticipated facing in 1999 or 2000. App., *infra*, 3a, 35a-36a. Utilities like TNMP must plan ahead in this manner so as not to be left without the means to generate or purchase the energy needed to fill the needs of its ratepayers. FERC, in fact, requires utilities to make such advance planning data public. *See* 18 C.F.R. § 292.302(b).

TNMP issued a request for proposal (RFP) that solicited bids to fill its anticipated needs for electricity for 1999 or 2000. App., *infra*, 3a. The RFP explained that the capacity being solicited was intended to replace capacity that TNMP had been purchasing from another Texas utility under a long-term contract that would expire by that time. *Ibid.*

Petitioner Power Resource Group responded to the RFP. Petitioner is an experienced developer of independent power projects with expertise in cost effective and reliable gas turbine technology. *Id.* at 3a; C.A. Rec. 175. Petitioner proposed a natural gas-fired cogeneration facility that would meet TNMP's stated needs. C.A. Rec. 175. FERC certified that facility as a QF "at all times since September 1996." App., *infra*, 57a; *see id.* at 3a-4a.

Petitioner proposed a purchase rate well below that of the expiring contract. C.A. Rec. 176. Over the course of almost two years of negotiations, with several different written contract proposals, petitioner sought to sell electricity and capacity to TNMP at rates below TNMP's future costs, C.A. Rec. 175-176, which, under PURPA, satisfied the requirement that a QF provide electricity at a rate less than the utility's avoided costs. *See* 18 C.F.R. § 292.304(b)(2). Petitioner, meanwhile, identified a site and equipment; negotiated a site option, thermal host agreements, and fuel supply options; held zoning discussions; engaged an engineering firm for initial

feasibility, engineering, and design work; worked with a joint venture partner that had project development and finance experience; and assessed environmental permitting. App., *infra*. at 4a, 36a.

TNMP refused to enter into the contracts that petitioner tendered in the course of the extensive negotiations. *Id*. at 36a. Ultimately, TNMP entered into a new purchase contract with its previous electricity provider – a traditional utility – at a higher rate than that offered by petitioner, resulting in higher costs for its ratepayers than if it had accepted petitioner's offer. *Id*. at 4a.

2. Petitioner filed a petition in August 1998 with the Texas PUC seeking to enforce its rights as a QF under PURPA to require TNMP to purchase its electricity. App., *infra*, 55a. Petitioner requested that the PUC order TNMP to contract with petitioner for the purchase of power or grant relief appropriate to enforce petitioner's PURPA rights. *Id*. at 55a, 36a. TNMP sought to dismiss petitioner's PUC petition on the ground that petitioner had not established a LEO under PURPA because petitioner had not yet built a facility and was unable to deliver power to TNMP within 90 days. *Id*. at 55a.

An administrative law judge denied the motion. The judge concluded that the rule "does not negate TNMP's duty to negotiate and contract with [petitioner] based on [petitioner]'s inability to deliver power within 90 days." *Power Res. Group, Inc. v. Public Util. Comm'n of Tex.*, 73 S.W.3d 354, 357 (Tex. App.-Austin 2002) (quoting ALJ's order).

The Texas PUC, however, reversed the administrative law judge. The PUC dismissed petitioner's state petition without prejudice on March 25, 1999, concluding that, under its 90-day rule, TNMP could not be compelled to purchase from petitioner. App., *infra*, 54a-58a.

3. Petitioner sought judicial review of the PUC's order in state court. The Travis County District Court affirmed the PUC's order on March 8, 2001, in an

unpublished order without articulating any rationale. App., *infra*, 37a (quoting order).

The Texas Court of Appeals affirmed. *See Power Res. Group, Inc. v. Public Util. Comm'n of Tex.*, 73 S.W.3d 354 (Tex. App.-Austin 2002). That court held that "the [PUC]'s interpretation of [Rule 25.242(f)(1)(B)] is reasonable and not preempted by federal law and that the [PUC] did not act arbitrarily or capriciously in refusing to compel TNMP to contract with [petitioner]." *Id.* at 363. The Texas Supreme Court denied review. App., *infra*, 5a.

4. Petitioner then petitioned FERC, pursuant to Section 210(h)(2)(B) of PURPA, 16 U.S.C. § 824a-3(h)(2)(B), to initiate an action against the Texas PUC for failure to implement properly PURPA's regulatory scheme. App., *infra*, 5a. FERC took no action on the petition, which meant that, upon expiration of 60 days, petitioner was authorized to file suit in district court. 16 U.S.C. § 824a-3(h)(2)(B).[5]

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[5] FERC's failure to initiate an enforcement action itself in this case is not a reflection on the merits or the importance of the issue. FERC has granted petitions for enforcement of PURPA on only two occasions in the past 25 years, one of which FERC later vacated and one of which involved an action on behalf of a family-owned QF where the family lacked the financial ability to litigate in federal court. *See ConocoPhillips Co. v. Los Angeles Dept. of Water & Power*, 110 F.E.R.C. ¶ 61,368 n.5 (2005). FERC's "more usual course" is to leave enforcement of PURPA to private parties. *Ibid.* Moreover, this particular case presented an unusual situation for FERC because there likely were only two commissioners who could have participated in the determination whether to bring an enforcement action. At the time, FERC had only three commissioners in office, the minimum number required to conduct business, *see* FERC, *2003 Annual Report*, at 2 (2003); 42 U.S.C. § 7171(e), and one – the Chairman of FERC – was likely disqualified from considering the petition for enforcement because he had been the Chair of the Texas PUC when petitioner's state application was pending there. App., *infra*, 57a; *cf. Mississippi Indus. v. FERC*, 808 F.2d 1525, 1567 (D.C. Cir. 1987) (recusal required "when the actions of a decision-maker lead one to conclude that he has prejudged the case").

Petitioner brought this action against respondent Texas PUC (through its three commissioners who were sued in their official capacities) in the United States District Court for the Western District of Texas for an order requiring, *inter alia*, the PUC to comply with Section 210(f) of PURPA, 16 U.S.C. § 824a-3(f), by implementing regulations giving "meaningful effect" to the LEO requirement. Respondent TNMP intervened in the action as a defendant.

In an initial order, the district court denied respondents' motions to dismiss the complaint on various procedural grounds. App., *infra*, 34a-53a.[6] In a second order, the district court entered judgment as a matter of law for respondents. App., *infra*, 17a-33a.

The district court determined that the facts in the case are undisputed. *Id.* at 32a. The court acknowledged that much of petitioner's argument is "technically true." *Id.* at 31a. Specifically, the court agreed with petitioner that FERC intended for a LEO "to be distinct from a contractual obligation" and that "the QF is granted the power [under FERC regulations] to decide whether a utility's avoided costs will be calculated at the time power is delivered or at the time" the LEO is incurred. *Ibid.*

But the district court concluded that it was the PUC's "prerogative" to choose to establish a LEO only "when a QF can deliver power or capacity within 90 days." *Id.* at

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[6] The district court held: that petitioner had statutory standing to bring the action under Section 210(h)(2)(B), 16 U.S.C. § 824a-3(h)(2)(B), App., *infra*, at 49a-50a; that neither *res judicata* nor the so-called *Rooker-Feldman* doctrine (*see Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)) prohibited petitioner from challenging respondent PUC's rules implementing PURPA despite losing the earlier state court action, App., *infra*, 40a, 43a-46a; that the suit was not barred by collateral estoppel, *id.* at 41a, 47a-48a; and that respondent PUC was not entitled to Eleventh Amendment immunity, *id.* at 50a-52a.

31a-32a. It reasoned that FERC left to state PUCs "in the first instance" resolution of "fact questions" regarding the "[e]xistence of a legally enforceable obligation and the time of its occurrence." *Id.* at 30a. Under that view, a PUC's decision about when a LEO "may be incurred" can never conflict with FERC's regulation. *Id.* at 32a. The court did not address petitioner's argument that the Texas 90-day rule "violates PURPA because no financier could determine the costs and benefits associated with building a QF before construction." *Id.* at 31a.

5. The court of appeals affirmed. App., *infra*, 1a-16a. The court stated that the "primary issue" before it was whether the Texas PUC's 90-day rule "runs afoul of PURPA and its associated federal regulations." *Id.* at 10a. The court reasoned that "[t]he plain text of the FERC regulation * * * fails to mandate" any requirement regarding the entitlement of unbuilt QFs to enter into LEOs, leaving definition of "the parameters for creating a LEO" to "the states and their regulatory agencies." *Id.* at 15a. The court did not address petitioner's claims that the PUC's 90-day rule does not "meaningfully implement the FERC's regulation's mandate for the option of a legally enforceable obligation" and "eviscerates the LEO option for unbuilt QFs, because a new facility cannot be financed and constructed in only 90 days." *Id.* at 13a. The panel denied a petition for rehearing. *Id.* at 59a-60a.

REASONS FOR GRANTING THE PETITION

REVIEW IS WARRANTED TO RESOLVE DISAGREEMENT AMONG THE LOWER COURTS AS TO WHETHER A FEDERAL STATUTE PREEMPTS A STATE LAW THAT FRUSTRATES THE PURPOSE OF THE FEDERAL STATUTE AND ITS IMPLEMENTING REGULATIONS

The decision of the Fifth Circuit below permits the State of Texas – one of the largest electricity markets in the country – effectively to exempt utilities from one of the critical requirements of PURPA: that they purchase

electricity from QFs, *i.e.*, federally-certified cogeneration and small power producers that reduce dependence on foreign energy sources. The court upheld a Texas rule that denies a QF the ability to lock in a purchase price from a utility until after the QF is built. The rule makes it virtually impossible for QFs to obtain the financing necessary for their development and construction as intended by PURPA. The Texas rule also deprives QFs of the ability to obtain any economically meaningful purchase price from a utility, even if a QF somehow managed to be constructed and ready to deliver electricity within 90 days. By the time the QF is operational, the utility would already have had to incur the cost of securing delivery of the electricity within 90 days from elsewhere, and, thus, there would be no "avoided" costs.

The ruling below permits Texas, in essence, to grant its utilities a waiver of PURPA's mandatory purchase obligation despite the fact that FERC already had decisively denied a request by Texas for such a blanket waiver of PURPA's mandatory purchase obligation. *See Cogen Lyondell, Inc.*, 95 F.E.R.C. ¶ 61,243, at 61,836 (2001). The ruling below, which improperly achieves that goal through another means, should be reversed.

The analytical error of the court of appeals, which brings it into conflict with this Court's precedents and the majority of other lower courts, was its failure to analyze whether the Texas PUC's 90-day rule frustrates the purpose of PURPA. In failing to do so, the court of appeals failed to abide by the well-established frustration-of-purpose preemption doctrine. A number of other lower courts also have questioned the appropriateness of, or failed to undertake, the frustration-of-purpose inquiry, under PURPA and other statutory schemes.

This Court's review is necessary to resolve the manifest contradiction between the ruling below and the precedent of this Court and of other lower courts that properly apply the preemption doctrine. Review is needed to reaffirm that frustration-of-purpose is a necessary part

of conflict preemption analysis. It also is needed to prevent individual States from achieving effective repeal of a federal statute that Congress deems significant to further the Nation's energy policy goals.

A. The Court Of Appeals Failed To Recognize, Contrary To The Preemption Doctrine Of This And Other Courts, That Because The Texas Rule Frustrates The Central Purpose Of A Federal Statute And Regulations, The Rule Is Preempted

1. The Fifth Circuit refused to apply the frustration-of-purpose preemption doctrine despite this Court's consistent reliance on that key doctrine

The Constitution designates the "Laws of the United States" as the "supreme Law of the Land." U.S. Const. art. VI. Pursuant to the Supremacy Clause, this Court has developed a number of separate categories for determining whether a state law is preempted by a federal law. First, if Congress enacts a provision that expressly addresses preemption, the federal statute preempts state law to the extent "the plain wording of the [preemption] clause" commands. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002).

Second, a federal statute can preempt a state law by implication, through either "field" or "conflict" preemption. *See id.* at 64. Field preemption, the rarer type of implied preemption, occurs "when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively." *Ibid.* (quoting *English v. General Elec.*, 496 U.S. 72, 78-79 (1990)). Conflict preemption exists where it either "is 'impossible for a private party to comply with both state and federal requirements,'" or "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"

Ibid. (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

This Court has long recognized this latter type of implied conflict preemption as "frustration-of-purpose" preemption and held that it is an "ordinary pre-emption principle[], grounded in longstanding precedent." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 874 (2000) (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941)); *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (preemption occurs when state laws "interfere with, or are contrary to the laws of Congress"); *Savage v. Jones*, 225 U.S. 501, 533 (1912) ("If the purpose of the [federal] act cannot otherwise be accomplished – if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect – the state law must yield to the regulation of Congress within the sphere of its delegated power"). Most recently, in *Mid-Con Freight Systems, Inc. v. Michigan Public Service Commission*, 125 S. Ct. 2427 (2005), the Court specifically inquired whether "the statute's basic purposes or objectives * * * impliedly pre-empt[ed]" the challenged state rules. *Id.* at 2434 (citing *Geier*, 529 U.S. at 881).[7]

The Fifth Circuit, in conflict with these decisions of this Court, and adding to a growing division in the lower courts, did not examine whether the Texas rule challenged in this case would frustrate the purposes of PURPA or FERC's implementing regulations. The Fifth Circuit looked only to whether there is a conflict between the Texas rule "[o]n its face" and PURPA's regulations. App., *infra*, 14a.

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[7] Congress's inclusion of an express preemption clause in a statute "does *not* bar the ordinary working of conflict pre-emption principles." *Sprietsma*, 537 U.S. at 65 (quoting *Geier*, 529 U.S. at 869). Thus, frustration-of-purpose preemption may occur regardless of whether the statute also has an express preemption provision. *See ibid.*; *Mid-Con*, 125 S. Ct. at 2434.

The court of appeals did not address the potential for frustration of the purpose of the federal statute and regulations, despite petitioner's argument that the Texas rule's denial to QFs of the "opportunity to assess financial feasibility before construction" had interfered with "PURPA's purpose of encouraging QF development." Pet. C.A. Br. 17-18. The court of appeals erred in "not extend[ing] its analysis beyond the face of the [Texas rule] to examine the effect of the rule" on the ability of an unbuilt QF to "secur[e] a market for its energy – the very protection that PURPA and the FERC regulations were designed to provide to QFs." Pet. for Reh'g 3; *see also id.* at 13 ("a state's discretion does not extend to implementing a rule which violates a fundamental tenet of PURPA"); *id.* at 1-2 (the "substance of the actual regulation" denies a QF its "federal PURPA rights by redefining which QFs are entitled to PURPA rights, in a manner incompatible with federal law").

Only by disregarding frustration-of-purpose preemption could the court of appeals affirm the judgment as a matter of law that the district court entered for respondents. The pleadings allege that "permitting a locked-in rate at a time prior to construction of a facility" as PURPA and its regulations require, is supposed to "allow[ ] a QF to obtain financing," but the limit imposed by the Texas 90-day rule "is an insufficient time for a QF to finance and construct a facility." C.A. Rec. 173, 177. Those allegations – which are based on common experience in the industry, *see* Part B, *infra* – establish that the Texas rule impedes significantly the development and construction of new QFs, contrary to the primary purpose of PURPA. The court of appeals expressly held that the facts in this case are not in dispute, App., *infra*, 3a, and that the rate offered by petitioner, the QF, was lower than the rate for which TNMP ultimately agreed to purchase electricity from another non-QF source, *id.* at 4a. The court of appeals could not have ruled against petitioner on the undisputed facts without holding, in essence, that the practical effect of the Texas rule on the

purpose of PURPA is irrelevant in assessing the validity of that rule.

Ignoring frustration-of-purpose preemption takes "from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect." *Geier*, 529 U.S. at 872. The frustration-of-purpose doctrine is necessary "to give full effect to national statutes" because "Congress cannot always foresee how state laws will obstruct the achievement of national statutory goals." Note, *A Framework for Preemption*, 88 Yale L.J. 363, 388-389 (1978).

2. The lower courts are split on the application of frustration-of-purpose preemption to claims under PURPA

a. The majority of federal and state courts correctly understand that this Court's cases require them to address frustration-of-purpose to decide whether PURPA preempts a state law. For example, the Third Circuit properly applied frustration-of-purpose preemption in *Freehold Cogeneration Assocs. v. Board of Regulatory Commissioners*, 44 F.3d 1178 (3d Cir.), *cert. denied*, 516 U.S. 815 (1995). The court held that PURPA preempted a state regulatory board's order directing a QF to renegotiate the rates under its agreement with a utility or agree to a buy-out. The court of appeals correctly recognized that federal preemption "is not necessarily dependent on express congressional authorization," but also occurs when "the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Id.* at 1190. The court determined that "PURPA and the implementing regulations establish an extensive federal system to encourage and regulate the sale of electrical energy by QFs." *Id.* at 1191. It then held that the state order was preempted because the "overall scheme of PURPA and its stated goal, and especially section 210(e)

and the implementing rules promulgated by the FERC," evidenced a congressional purpose to exempt QFs from state and federal utility rate regulations. *Id.* at 1192. This is precisely the method of analysis that the Fifth Circuit should have undertaken here, which would have led to its finding the Texas 90-day rule preempted.

Various state courts also have correctly included the frustration-of-purpose prong in their analysis of federal preemption under PURPA. In *Smith Cogeneration Management v. Corporation Commission & Public Service Co.*, 863 P.2d 1227 (Okla. 1993), the Oklahoma Supreme Court concluded that a state commission rule requiring a provision in a QF's contract with an electric utility for reconsideration of avoided costs during the term of the contract was impliedly preempted by federal law. The court found that there was conflict preemption because the state rule stood "as an obstacle to the accomplishment of PURPA and FERC regulations" to the extent that it "prevent[ed] cogenerators from obtaining the necessary financing to develop a facility." *Id.* at 1241. The Texas 90-day rule stands as an obstacle to the federal scheme for the same reason. *See* pages 24-26, *infra*.

Even in cases that ultimately have found that a state regulation was not preempted by PURPA, the lower courts have considered whether the state law frustrated the purpose of PURPA, unlike the Fifth Circuit in the instant case. In *Greensboro Lumber Co. v. Georgia Power Co.*, 844 F.2d 1538 (11th Cir. 1988), the Eleventh Circuit affirmed a district court's determination that a state law was not preempted because it was "consistent with the objective of section 210 of PURPA." *Id.* at 1543.

In *Resource Technology Corp. v. Illinois Commerce Commission*, 822 N.E.2d 50 (Ill. App. Ct. 2004), *appeal denied*, 833 N.E.2d 9 (Ill. 2005), *cert. denied*, 126 S. Ct. 745 (2005), an Illinois appellate court held that a state commission's review under state law of a facility's status as a qualified solid waste facility based on alleged violations of FERC fuel usage regulations was not preempted by

PURPA and expressly considered frustration-of-purpose preemption. "[T]he Commission's review does not stand as an obstacle to the accomplishment and execution of FERC's objectives under PURPA." *Id.* at 56.[8]

If this case had been adjudicated in any of these courts, the outcome would have been different. These courts understand that PURPA preempts more than just those state laws and rules that facially conflict with the text of the federal law and regulations. Examining the purposes of PURPA and its regulations, as we do in Part B, *infra*, these courts would have concluded that a state rule, such as the Texas rule, which effectively provides that public utilities have no obligation to purchase electricity from unbuilt QFs, frustrates Congress's purpose to encourage the development and construction of new QFs because, absent such an obligation from a utility to purchase the electricity that the intended facility will produce, QFs will not be able to obtain the financing for construction. Therefore, in a jurisdiction where implied conflict preemption is correctly analyzed, this Texas rule would be found to be preempted as a frustration of the purpose of the federal statute and regulations.

b. The Fifth Circuit's decision, unfortunately, is not the only one that has failed to address frustration-of-purpose in deciding preemption claims under PURPA and its implementing regulations. For example, in *Iowa Power and Light Co. v. Iowa State Commerce Commission*, 410 N.W.2d 236 (Iowa 1987), the Iowa Supreme Court held that a preemption claim was without merit because the state policy did not directly conflict with "the broad language of the federal regulations accompanying PURPA." *Id.* at 242. Similarly, the Maine Public Utilities Commission, without assessing frustration-of-purpose,

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[8] The petition for *certiorari* in that case did not raise frustration-of-purpose preemption as a ground for review, nor did it raise any claim that the split it identified had any ramifications beyond state collateral inquiries into the certification of a QF under PURPA.

rejected a claim that a state regulation requiring net energy billing was preempted by PURPA. *See In re Talmage*, No. 97-513, 1997 Me. PUC LEXIS 179 (Oct. 27, 1997). The PUC described conflict preemption as occurring simply when "state law conflicts with federal law or regulations in such a way that it becomes impossible to comply with both simultaneously." *Id.* at *8. After determining that compliance with state law could occur without compelling purchase rates expressly prohibited by FERC's regulations, *id.* at *14, the agency stopped its preemption inquiry. In both cases, the preemption analysis was incomplete, as in the Fifth Circuit in the instant case, and entirely failed to examine whether the state provision frustrated the purposes of PURPA.

3. The disagreement in the lower courts on whether frustration-of-purpose constitutes preemption extends beyond PURPA

a. The Fifth Circuit panel in this case is not the only panel of that court to demonstrate a hostility to the frustration-of-purpose component of conflict preemption. For example, in *Moss v. Merck & Co.*, 381 F.3d 501 (5th Cir. 2004), the Fifth Circuit rejected an argument that state tort claims frustrated the purpose of, and thus were impliedly preempted by, the federal National Childhood Vaccine Injury Act. The panel viewed that argument as urging that the statute be applied "in a way that robs the plaintiffs of the right to sue." *Id.* at 502. The panel held that, "[i]f it is indeed the case that loss-of-consortium claims frustrate this complex federal regime, Congress can enact a change. For all we know, this possibility *was* considered, and a conscious decision was made not to regulate consortium claims. Either way, it is not for this court to decide what Congress should have done, but only to apply a statute that on its face has nothing to say about consortium claims." *Id.* at 505. *See also Hurley v. Lederle Labs. Div. of Am. Cyanamid Co.*, 863 F.2d 1173 (5th Cir.

1988) (reversing district court's ruling that state products liability law was impliedly preempted by the federal statutory scheme to encourage vaccination, but without assessment of whether state law would frustrate purpose of federal statute).

Indeed, this Court has before reversed the Fifth Circuit in circumstances comparable to those here where the court of appeals did not apply frustration-of-purpose preemption although it was outcome determinative. In *Boggs v. Boggs*, 82 F.3d 90 (5th Cir. 1996), the Fifth Circuit held that a state law was not preempted by ERISA without examining whether ERISA's purpose was frustrated by the state law. This Court reversed, holding that the state law was preempted because the state law "would undermine the purpose of ERISA's mandated survivor's annuity." *Boggs v. Boggs*, 520 U.S. 833, 844 (1997).

The ruling below is the latest manifestation of a more widespread skepticism in the Fifth Circuit regarding frustration-of-purpose preemption. Three members of the Fifth Circuit, including one of the members of the panel below, had joined a dissent from rehearing *en banc* that described frustration-of-purpose preemption as "highly problematic" and "of dubious propriety." *City of Morgan City v. South La. Elec. Coop. Ass'n*, 49 F.3d 1074, 1079 (5th Cir. 1995) (E. Jones, J., joined by Smith and DeMoss, JJ., dissenting). That dissent noted that then-Judge Kenneth Starr had authored a report, joined by other federal and state appellate judges, stating that frustration-of-purpose preemption "demands a high degree of judicial policymaking." *Id.* at 1078-1079 (quoting Kenneth Starr *et al.*, *The Law of Preemption: A Report of the Appellate Judges Conference, American Bar Association* at 38 (1991)). That dissent also complained that the doctrine is "unwholesome" because it transfers power from Congress and local governments to "federal judges, who have the final, delphic say in what constitutes a 'frustration of purpose.'" *Id.* at 1079.

b. It is not only the Fifth Circuit that is reluctant to apply the frustration-of-purpose in non-PURPA cases. Other members of the lower federal courts have expressed views similar to those of the Fifth Circuit that frustration-of-purpose preemption constitutes inappropriate judicial policy-making. For example, in *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988), a panel of the Fourth Circuit refused to find frustration-of-purpose preemption of a state tort claim and described frustration-of-purpose preemption as "an exercise of policy choices by a court" that is applied "in the face of congressional silence, both express and implied, on the subject." Some state courts also have refused to apply frustration-of-purpose preemption.[9]

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[9] In *Diamond Multimedia Systems, Inc. v. Superior Court of Santa Clara County*, 968 P.2d 539 (Cal.), *cert. denied*, 527 U.S. 1003 (1999), the California Supreme Court held that a state securities law was not preempted by federal law because there was no conflict between state law and any specific "provision of the federal securities laws applicable to this litigation." *Id.* at 552. The dissenters noted in that case that "[t]hat does not end the preemption inquiry" because a court must still assess whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 559 (Brown, J., dissenting). Indeed, as then-Justice Brown explained, the majority decision "ignore[d] well-established principles governing implied preemption even in the face of the near unanimity among courts across the country in holding that similar [federal provisions] preempted state laws in conflict with Congress's intent." *Id.* at 563, 561.

The Utah Supreme Court also resolved a preemption case solely with reference to whether a state law regarding liens on Medicaid recipients' settlement proceeds "violate[d] federal law," and refused to examine whether there was a frustration-of-purpose preemption. *Houghton v. Department of Health*, 57 P.3d 1067, 1069 (Utah 2002), *cert. denied*, 538 U.S. 945 (2003). Yet as the dissenting Justice noted in that case, "analysis of whether state law tends to undermine federal purposes * * * is susceptible to being conflated with overt conflict between federal and state law, and therefore overlooked. * * * The court explicitly addressed the need to harmonize federal provisions * * *, but did not fully examine the purposes the anti-lien provision is intended to

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Lower courts may be emboldened by this Court's recent unexplained silence regarding frustration-of-purpose preemption in *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788 (2005). *See id.* at 1807 (Thomas, J., dissenting in part) (suggesting that Court's silence regarding respondent's frustration-of-purpose argument reflects its "increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption"). Courts that are already hostile to frustration-of-purpose preemption may rely on such ambiguities to continue to disregard or misapply this important doctrine, despite the Court's consistent articulation and application of the doctrine in other recent cases. *See Mid-Con Freight Systems*, 125 S. Ct. at 2434; *Aetna Health Inc. v. Davila*, 542 U.S. 200, 217 (2004); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000); *Geier*, 529 U.S. at 881. Review by this Court is necessary to eliminate the conflict among the lower courts on this issue and to bring them into line with this Court's precedent.

B. Review By This Court Is Especially Important Because The Court Of Appeals' Ruling Undermines The Proper Functioning Of PURPA

The "basic purpose of § 210 of PURPA was to increase the utilization of cogeneration and small power production facilities," *i.e.*, QFs. *American Paper Inst., Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 417 (1983). The structure of PURPA, as implemented by FERC's regulations, demonstrates that the paramount purpose of

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serve, or whether the court's resolution is likely to undermine that purpose." *Id.* at 1074 (Durham, C.J., dissenting in part); *see also Ino Ino, Inc. v. City of Bellevue*, 937 P.2d 154, 158-159 (Wash. 1997) (rejecting without discussion dissenting Justices' contention that state law authorizing award of attorneys' fees to a defendant in a civil rights action is preempted because it frustrates the purpose of federal fee-shifting statute), *cert. denied*, 522 U.S. 1077 (1998).

PURPA is to encourage the construction of new QFs to replace traditional utility sources of energy. To accomplish this goal, a QF must be able to assess financial feasibility and obtain financing before it is built.

1. The Texas 90-day rule defeats this goal. First, it prevents such financing because it precludes an unbuilt QF from establishing a non-contractual LEO with a utility obligating the utility to purchase electricity from the QF at a particular fixed rate unless the unbuilt QF can be built and ready to provide electricity to the utility within 90 days of the LEO. No QF, indeed no power plant, can be built in 90 days. By sustaining the Texas 90-day rule, the court of appeals wholly disregarded that simple reality of the market which Congress and FERC had fully appreciated.[10]

The market will not finance the construction of a QF in the absence of a secured purchase rate for a utility's purchase of electricity from the QF. As FERC explained, "QFs bear development risks not experienced to the same extent by traditional utilities. As a result, they must rely on their power purchase agreements to obtain project financing * * *." *Petition of New York State Gas & Electric,*

[10] There is no dispute that the regulations permit unbuilt facilities to be certified by FERC as QFs prior to construction. For example, the regulations require QFs certified by FERC to file a notice with FERC whenever there is a change in the "installation" date compared to that in the original application, *i.e.* the date construction will begin, 18 C.F.R. § 292.207(a)(2)(B); *Sunnyside Cogeneration Assocs.*, 53 F.E.R.C. ¶ 62,029, at 63,027 (1990), or whenever there is a "change in the location of a co-generation facility, or a small power production facility" compared to that in the original application. 18 C.F.R. § 292.207(a)(2)(D). FERC has consistently certified unbuilt QFs under PURPA. *See, e.g., Exxon Co., U.S.A.*, 57 F.E.R.C. ¶ 62,173, at 63,298 (1991). The States have no role in certifying or decertifying QFs, and cannot second-guess FERC through their own regulatory schemes, as does the Texas PUC rule at issue here. *See Independent Energy Producers v. California Pub. Utils. Comm'n*, 36 F.3d 848, 856 (9th Cir. 1994).

71 F.E.R.C. ¶ 61,027, at 61,118 (1995), *recon. denied*, 72 F.E.R.C. ¶ 61,067 (1995).

In promulgating its regulations, FERC determined that a QF must have the ability to secure a purchase rate prior to the QF's construction because "an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment *before the construction of a facility*" in order "to evaluate the financial feasibility of a cogeneration or small power production facility." 45 Fed. Reg. at 12,218 (emphasis added). FERC also concluded that the return relevant to the investor "will be determined, in part, by the price at which the qualifying facility can sell its electric output" consistent with the purchase rate options set forth in Section 292.304. *Ibid.* Testimony by many involved in the electricity industry, including Texas utilities, at congressional hearings reviewing PURPA's implementation, confirm this common sense finding.[11]

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[11] *See Independent Power Producers: Hearing before the Subcomm. on Energy Conservation & Power of the House Comm. on Energy & Commerce*, 99th Cong. 70, 74 (1986) (testimony of Anna Lou Fletcher, Vice President, Investment Banking Division, Kidder, Peabody & Co.) (a critical question before financing a QF: "is the power contract in place? * * * The power sales agreement must provide for an identifiable revenue stream that the utility is committed to pay if the power producer performs."); *id.* at 92 (statement of D.D. Jordan, Chairman and CEO, Houston Lighting & Power Co.) ("As noted in the House and Senate oversight hearings, at the present time private investors in PURPA qualifying facilities do not appear willing to assume the risks of power production without a guaranteed market and price."); *id.* at 186 (statement of American Paper Institute) ("As a general matter, a cogenerator needs a long-term contract for the sale of electricity to a utility in order to secure financing for the facility."); *id.* at 223 (statement of Chadbourne & Parke) ("Most large QFs must have a long-term power sale contract to obtain financing to build facilities large enough to produce power exceeding internal loads * * *."); *id.* at 319 (statement of Cogeneration Coalition of America) ("Many financial institutions, uncertain of future avoided costs of most electric utilities, are unwilling to issue debt where the revenue stream is open to question over the project life."). A leading academic commentator

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The court of appeal's holding thus sanctions a state policy that also is contrary to the necessary premise upon which other States predicate their regulations implementing PURPA. Other States understand that QFs cannot obtain in advance the financing required for construction unless QFs can confirm the utilities' mandatory obligation to purchase electricity at a particular price after the QFs are built. *See, e.g., Appeal of Pub. Serv. Co. of N.H.*, 539 A.2d 275, 280 (N.H. 1988) ("The PUC practice of granting a long-term rate to a cogenerator based on the rate schedule in effect at the time of filing the rate petition is consistent with the FERC policies and rules" that "recognize[] that investors must be able to estimate the expected return on their investment with reasonable certainty before the development of a qualifying facility."); *Smith Cogeneration Mgmt.*, 863 P.2d at 1241 (Oklahoma rule is preempted to the extent "that [it] prevents cogenerators from obtaining the necessary financing to develop a facility").

Second, apart from ignoring the reality of the market and the question of financing construction, the Texas 90-day rule eviscerates the obligation of a utility to purchase electricity from an unbuilt QF. A public utility is required to plan ahead to meet anticipated future electricity needs, whether by constructing its own new facility or by committing to purchase electricity from another source to fill future needs. QFs are intended to replace those sources of electricity, both utility-constructed facilities and other traditional sources of electricity. *See* 18 C.F.R. § 292.303(a); *FERC v. Mississippi*, 456 U.S. at 750-751.

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confirms that "[t]o be able to successfully structure project finance for a facility, there must be an assured market for the power that is produced for the life of any third-party financing supplied." 1 Steven Ferrey, *Law of Independent Power: Development/Cogeneration/Utility Regulation* § 3:61 at 3-143 (8th rel. 2005); *see id.* § 10:20, at 10-76 ("QFs must have certainty [in sale price] to proceed with constructing and operating a power facility").

Under the Texas rule, however, by the time a QF can establish a LEO and require a utility to purchase electricity from it, *i.e.*, 90 days before delivery, the utility necessarily would have had to plan, develop and construct its own facility or commit to meet its forecasted electricity needs through purchases from another source. At that point, the utility would have already incurred the costs through one of those means. Therefore, even if a QF somehow managed to be constructed without establishing a pre-existing obligation from a utility to purchase electricity at a specified rate, the QF's ability to enforce an obligation under PURPA for the utility to purchase its electricity at the "avoided" costs would be worthless because there would be no avoided costs.

2. PURPA, as properly implemented in many States, has successfully furthered Congress's goal to encourage the development of cogeneration and small power production. When PURPA was enacted, there was a negligible share of electricity attributable to independent (non-utility) power producers. By the mid-1990s, however, independent power producers were providing well over half of all new generating capacity. *See Southern Cal. Edison Co.*, 70 F.E.R.C. ¶ 61,215, at 61,675 (1995). Today, independent power producers including QFs, are responsible for more than 33% of the Nation's electricity generation. *See* Energy Info. Admin., U.S. Dep't of Energy, *Electric Power Monthly* (Jan. 11, 2006) (based on data through October 2005). The Fifth Circuit's decision threatens these developing markets for alternative sources of energy, particularly in light of the fact that financing of QF projects is even more difficult to obtain than it was in the past. *See* 1 Steven Ferrey, *Law of Independent Power: Development/Cogeneration/Utility Regulation* § 3:90, at 3-167 (8th rel. 2005).

Respondents have, in the past, cited the QFs that do exist in Texas as evidence that PURPA purportedly is working in that State. This assertion ignores the incentive that utilities had, prior to the Texas PUC's new

interpretation of the 90-day rule in this case, to bargain with QFs in order to avoid a PUC proceeding to enforce the mandatory purchase obligation. A commissioner of the PUC of Texas testified before Congress in an oversight hearing that "[c]ogenerators have found that the ability and willingness to file a complaint [against a public utility] with the PUC is often an essential element of getting to the bargaining table as an equal player" and that the answer to the "major question" of whether the utilities were "bargaining in good faith" prior to the full implementation of PURPA was "[e]ssentially," that they were not because "[t]hey were stalling." *Implementation of the Public Utility Regulatory Policies Act of 1978: Hearings before the Senate Comm. on Energy & Natural Resources*, 99th Cong. 530, 544 (1986) (testimony of Dennis Thomas, Commissioner, Public Utility Commission of Texas).

There is every reason to believe that, if the 90-day rule is allowed to stand, utilities will rely on the rule to refuse to bargain with all unbuilt QFs, and new QF construction will come to a halt in Texas. Indeed, following the Texas PUC's interpretation of its 90-day rule in this case, the Texas PUC found in another proceeding that an electric utility was not required to negotiate with a QF that wished to generate electricity through wind facilities because it would take 561 days before the facilities were operational. *See* Final Order, *Great Plains Windpower, LLC*, 2004 Tex. PUC LEXIS 27, at **12-13. That QF "ha[d] undertaken substantial development efforts, including land acquisition and permitting, EPC contract negotiation, interconnection studies, and equity financing," and complained that the utility had nonetheless "refused to negotiate or to agree that an obligation has been created to purchase the output of Great Plains' QF projects, citing the PUC's interpretation of its QF rules" in this case. Motion to Intervene at 3, *Power Resource Group, Inc.*, Dkt. No. EL03-136-000 (FERC July 21, 2003).

3. Congress has declined repeated requests from some quarters – primarily utilities and utility-led groups –

to repeal PURPA, choosing instead to adapt PURPA to the changing electric energy environment while preserving its support of the developing independent power market.

In the Energy Policy Act of 2005, Congress amended PURPA to authorize FERC to exempt a utility from future mandatory purchase obligations, but only where a utility can demonstrate, after notice to QFs and an opportunity for comment, that its service area meets specific criteria evidencing a competitive market for long-term electricity contracts available to QFs. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1253, 119 Stat. 967-969 (2005) (codified at 16 U.S.C. § 824a-3(m)). Thus, FERC is vested with the authority to determine whether a utility can be exempted.

In 2001, before the instant case, Texas had requested from FERC a "complete waiver of the PURPA purchase obligation for all Texas utilities." FERC rejected that request and determined that the purchase obligation is "necessary to encourage cogeneration and small power production" in Texas. *Cogen Lyondell, Inc.*, 95 F.E.R.C. ¶ 61,243, at 61,836 (2001); *see also Cogen Lyondell, Inc.*, 98 F.E.R.C. ¶ 61,182, at 61,673 (2002) (authorizing QFs to sue PUC of Texas for failing to comply with FERC's order denying a waiver). Yet, the Fifth Circuit's decision now permits Texas to exempt its public utilities from PURPA's mandatory purchase obligation for unbuilt QFs, contrary to FERC's determination and without any notice to the QFs or any of the oversight from FERC required under the 2005 amendments.

After the Fifth Circuit's holding in this case, other States now can adopt Texas's rule and, as a practical matter, stop new QFs from being built, and thereby create a risk that, over time, the number of facilities from which a utility can be required to purchase electricity will dwindle to none. The States should not be allowed to do so through this means which was not contemplated by Congress. *See Petition of New York State Gas & Elec.*, 71

F.E.R.C. ¶ 61,027, at 61,118 (1995) (legal rules that would hamper the "financeability of such projects" are "not, in our opinion, consistent with Congress' directive that we encourage the development of QFs"), *recon. denied*, 72 F.E.R.C. ¶ 61,067 (1995); *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1487 (D.C. Cir. 1997) ("PURPA gives States responsibility only for 'implementing' [the FERC rules]; it does not authorize the States to override or to subvert those rules.").

Even more fundamentally, the court of appeals' ruling undermines the cooperative federalism on which PURPA and other federal schemes are based. By refusing to find preempted a state rule that frustrates the central purpose of a federal statute on the ground that the state rule, on its face, does not conflict with the federal statute and its regulations, the court of appeals' approach will require Congress and federal agencies to delineate with much greater detail the limits on the scope of state implementation. That approach will undermine the limited flexibility and variation that cooperative federalism affords the States.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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JANUARY 17, 2006

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-50807

POWER RESOURCE GROUP, INC.,

Plaintiff-Appellant,

versus

PUBLIC UTILITY COMMISSION OF TEXAS, BARRY T. SMITHERMAN, In his Official Capacity as Commissioner of the Public Utility Commission of Texas, JULIE PARSLEY, Commissioner of the Texas Public Utility Commission, PAUL HUDSON, Chairman of the Texas Public Utility Commission,

Defendants-Appellees,

TEXAS NEW MEXICO POWER COMPANY,

Intervenor Defendant-Appellee.

Appeal from the United States District Court

For the Western District of Texas

Filed August 17, 2005

Before GARWOOD, SMITH and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

In this regulatory action, Power Resource Group ("PRG") challenges Texas's implementation of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). After purchase negotiations between PRG and Texas New Mexico Power Company ("TNMP") failed, PRG sought to compel TNMP to purchase power pursuant to a legally enforceable obligation ("LEO") from its still-unbuilt plant. The Public Utility Commission of Texas ("PUC") determined that because its rules implementing PURPA provide for a legally enforceable obligation only if a facility is within ninety days of delivering power, TNMP had no obligation to purchase power from PRG. PRG sought relief in Texas courts, which denied its request to overturn the PUC's decision. PRG then brought suit in federal district court, which held that it had jurisdiction only to determine whether the PUC had fully implemented PURPA, and dismissed PRG's remaining claims. Finding that the PUC did, in fact, fully implement PURPA, including providing for the option of a LEO, the district court granted summary judgment in favor of the PUC and TNMP. PRG now appeals. For the reasons that follow, we affirm the judgment of the district court.

I. FACTS AND PROCEEDINGS

This case concerns Texas's interpretation and implementation of a federal statutory and regulatory scheme governing the contracting for the purchase of energy between public utilities and certain energy production facilities. The facts are not in dispute. Congress enacted PURPA to reduce the dependence of electric utilities on foreign oil and natural gas, in part by encouraging development of alternative energy sources such as cogeneration and small power production facilities ("qualifying

facilities" or "QFs"). *Brazos Elec. Power Coop. Inc. v. FERC*, 205 F.3d 235, 237 (5th Cir. 2000); *see also FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982) (citing S. Rep. No. 95-442, p. 9 (1977)). PURPA directs the Federal Energy Regulatory Commission ("FERC") to promulgate regulations that would promote energy purchase from QFs. 16 U.S.C. § 824a-3(a). State regulatory agencies, such as the PUC, are directed to adopt rules which comply with FERC's regulations and implement PURPA. 16 U.S.C. § 824a-3(f). The Texas rule at issue here, PUC Substantive Rule 25.242(f)(1)(B),[1] controls when and under what conditions a utility must purchase power from a QF pursuant to a LEO, as opposed to voluntarily contracting with the QF. Rule 25.242(f)(1)(B), or the "90-day rule," provides that a utility may be compelled purchase power from a QF pursuant to a LEO only if the QF can provide that power within 90 days. PUC SUBST. R. 25.242(f)(1)(B).

PRG is a Delaware corporation and an experienced developer of independent power projects. TNMP is a Texas electric utility under the authority of the PUC. Prior to 1995, TNMP contracted with Texas Utilities Electric Company to purchase power. In 1995, TNMP issued a request for proposal for energy to fill its anticipated need for 1999 or 2000. PRG responded to the request, proposing construction of a QF, a natural gas-fired generation facility, to be located in Lewisville, Texas – the Lewisville Power Project. In March of 1996, PRG and TNMP entered into negotiations for the Lewisville Power Project to provide power to TNMP. The Lewisville Power Project was

[1] This Rule was previously codified at PUC SUBST. R. 23.66(d)(1)(C). We refer to the Rule by its current citation, PUC SUBST. R. 25.242(f), or as the "90-day rule."

certified as a QF on September 20, 1996 pursuant to 18 C.F.R. § 292.207(a)(1). PRG secured sources of equity, identified a site, held zoning discussions, and undertook various other steps in furtherance of the Lewisville Power Project. On February 13, 1998, PRG made a final written commitment which, it argues, gave rise to a LEO. TNMP then denied the existence of a LEO and refused to execute an agreement with PRG. TNMP instead renegotiated with its previous provider at a rate higher than that offered by PRG.

On August 7, 1998, PRG petitioned the PUC to order TNMP to purchase power from PRG's Lewisville Power Project. On March 25, 1999, the PUC dismissed PRG's petition without prejudice, interpreting the applicable rule, PUC SUBST. R. 25.242(f)(1)(B), such that utilities were required to purchase from a QF pursuant to a LEO only if the QF could deliver power within 90 days of notifying the utility that energy would be available. The PUC determined that under Texas law, because PRG's QF was not yet completed and therefore incapable of producing power for delivery within 90 days, a LEO was not created when PRG offered to supply energy to TNMP.

PRG then sought judicial review of the PUC's order in state court in Travis County, Texas. The Travis County District Court affirmed the PUC's final order on March 8, 2001. PRG appealed the ruling to the Third Court of Appeals in Austin. On January 10, 2002, that court affirmed the Texas trial court and the PUC, holding that "the [PUC]'s interpretation of [Rule 25.242(f)(1)(B)] is reasonable and not preempted by federal law and that the [PUC] did not act arbitrarily or capriciously in refusing to compel TNMP to contract with [PRG]." *Power Res. Group, Inc. v. Pub. Util. Comm'n of Tex.*, 73 S.W.3d 354, 363 (Tex.

App. – Austin 2002, pet. denied). PRG petitioned for review by the Texas Supreme Court; that petition was denied on October 10, 2002.

PRG then petitioned FERC pursuant to 16 U.S.C. § 824a-3(h)(2)(B), requesting that FERC undertake an enforcement action against the PUC for its failure to implement PURPA's regulatory scheme. After FERC had not acted on PRG's petition for 60 days, PRG filed a complaint in the United States District Court for the Western District of Texas, as authorized under 16 U.S.C. § 824a-3(h)(2)(B) (providing that a United States District Court may "require such State regulatory authority . . . to comply with such requirements [of section 824a-3(f)], and such court may issue such injunctive or other relief as may be appropriate").

The PUC and TNMP, as an intervenor, moved to dismiss PRG's action, arguing that (1) the Rooker-Feldman doctrine barred district court review of PRG's claim because proper review of the federal question was available via a petition for certiorari to the United States Supreme Court; (2) because the Texas state courts had decided the issues presented, *res judicata* and/or collateral estoppel barred the same claims in federal court; (3) PRG had no standing under § 824a-3(h)(2)(B) because it is not a QF; and (4) sovereign immunity barred pursuit of the claim in federal court. PRG responded that Rooker-Feldman, *res judicata,* and collateral estoppel did not apply because federal courts have exclusive jurisdiction over claims under PURPA. It also argued that it was a certified QF and, therefore, had standing, and that the prospective relief it requested was not barred by sovereign immunity.

On February 18, 2004, the district court ruled on the motion to dismiss, denying the motion as to PRG's implementation claim. The district court analyzed the effect of PURPA's unique "multi-layered" enforcement provisions on the defendants' Rooker-Feldman and preclusion arguments. As the district court explained, "[t]he type of claim brought by the petitioner will determine whether state court, FERC or federal district court is the appropriate forum under the statute." *See* 16 U.S.C. § 824a-3(g)-(h). Subsection (g) of § 824a-3 mandates that state courts will review the state rules promulgated to implement PURPA and its associated FERC regulations. *See* 16 U.S.C. § 824a-3(g)(1)-(2); *see also Windway Techs. v. Midland Power Coop.*, 2001 U.S. Dist. LEXIS 3430, at *14 (N.D.Iowa Mar. 5, 2001). Subsection (h)(1) mandates that FERC regulations promulgated to implement PURPA are to be treated like Federal Power Act ("FPA") rules, which are enforceable by FERC in federal district court. *See* 16 U.S.C. §§ 824a-3(h)(1) and 825m; *see also Windway Techs.* at *15. Subsection h(2)(A) of PURPA allows FERC to bring an enforcement action against a state regulatory authority such as the PUC or a nonregulated utility in district court. *See* 16 U.S.C. §§ 824a-3(h)(2)(A); *see also Windway Techs.* at *15. Subsection (h)(2)(B) provides that any utility or qualifying facility may petition FERC to enforce subsection (f), which governs the responsibilities of state regulatory authorities and utilities to implement PURPA and FERC regulations. *See* 16 U.S.C. §§ 824a-3(h)(2)(B); *see also Windway Techs.* at *15. If FERC does not bring an enforcement action within 60 days following the date on which a petition is filed, the utility or qualifying facility may bring an enforcement action in federal district court. 16 U.S.C. §§ 824a-3(h)(2)(B); *Windway Techs.* at *15.

The district court then elucidated the distinction between two types of enforcement claims under PURPA, "as applied" claims and implementation claims: "'An implementation claim involves a contention that the state agency . . . has failed to implement a lawful implementation plan under § 824a-3(f) of the PURPA, whereas an "as-applied" claim involves a contention that the state agency's . . . implementation plan is unlawful, as it applies to or affects an individual petitioner.'" *Power Res. Group, Inc. v. Klein,* No. A-03-CA-762-H, slip op. at 12 (W.D. Tex. Feb. 18, 2004) (quoting *Windway Techs.* at *17). The district court explained that federal district courts only have jurisdiction if the party has first petitioned FERC to bring an enforcement action and FERC failed to do so, and the claim must challenge the state regulations as unlawful implementations of PURPA and FERC regulations. Federal courts may not hear "as applied" claims, because jurisdiction over such claims is reserved to the state courts. *Id.* (citing *Indus. Cogenerators v. FERC,* 47 F.3d 1231, 1234 (D.C. Cir. 1995); *Mass. Inst. of Tech. v. Mass. Dep't of Puc. Utils.,* 941 F. Supp. 233, 236 (D. Mass. 1996); *Greensboro Lumber Co. v. Ga. Power Co.,* 643 F. Supp. 1345, 1374 (N.D. Ga. 1986)).

Federal jurisdiction over implementation claims, the district court held, is exclusive. *Id.* at 13 (citing *Indus. Cogenerators,* 47 F.3d at 1235-36 (D.C. Cir. 1995) ("Congress created in § [824a-3] a complete and independent scheme by which the purposes of the PURPA are to be realized. That scheme involves the promulgation of regulations by the FERC, and their subsequent enforcement *exclusively in federal district court,* at the insistence of either a private party or of the FERC itself.") (emphasis added)). The court concluded that PRG's implementation

claim – that the PUC had failed to implement PURPA by adopting rules which did not give effect to FERC's legally enforceable obligation provision – was under exclusive federal jurisdiction. As such, the court held, this claim is not barred by the Rooker-Feldman or claim preclusion doctrines. The court further held that the implementation claim was not barred by the doctrine of collateral estoppel because PRG had not actually litigated an implementation claim in state court. While PRG did argue to the state court that the 90-day rule conflicted with PURPA, the district court held, this argument amounted to an "as applied" claim, not an implementation claim.

The district court then construed PRG's other claims requesting injunctive relief against the PUC as "as applied" claims and held that they had been determined by the Texas state courts. It concluded that the only issue properly before it was whether the PUC failed to implement PURPA. The court further held that PRG did have standing under § 824a-3(h)(2)(B) because it was a QF, and that the PUC's motion to dismiss on the ground of sovereign immunity was without merit.

On July 15, 2004, the district court issued a memorandum opinion and order on three pending dispositive motions, all centering on one issue: whether in codifying Substantive Rule 25.242(f)(1)(B), the PUC fully implemented the regulations promulgated by FERC pursuant to PURPA. The court held in the affirmative and entered summary judgment in favor of the PUC and TNMP. *Power Res. Group v. Hudson,* No. A-03-CA-762-H (W.D. Tex. July 15, 2004).

PRG timely appealed the district court's determinations (1) that the 90-day rule does not violate PURPA and

(2) that the district court lacked jurisdiction to grant relief of PRG's as-applied claims. The PUC and TNMP argue, as an alternative ground upon which this Court could affirm the judgment of the district court, that the district court erred in determining that PRG's claims were not barred by collateral estoppel.

II. STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *Smith v. United States*, 391 F.3d 621, 624 (5th Cir. 2004); *see also Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1234 (D.C. Cir. 1995) (explaining that a decision of a district court in an enforcement action brought pursuant to 16 U.S.C. § 824a-3(h)(2)(B) "is reviewable in the court of appeals in the ordinary course").

State regulatory authorities such as the PUC are required to implement PURPA pursuant to the rules and regulations promulgated by FERC. *See* 16 U.S.C. § 824a-3(f). We review the PUC's implementation with deference because "[a] state has broad authority to implement PURPA with respect to the approval of purchase contracts between utilities and QFs." *N. Am. Natural Res., Inc. v. Mich. Pub. Serv. Comm'n*, 73 F. Supp. 2d 804, 807 (D. Mich. 1999) (*citing Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc.*, 159 F.3d 129, 135 (3d Cir. 1998) ("Though PURPA does limit the authority of state agencies in some respects, e.g., by exempting cogeneration facilities from some regulation, PURPA still provides a substantial role to state agencies in regulating energy contracts between utilities and cogenerators"); *Indep. Energy Producers v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 856 (9th Cir. 1994) (noting that "the state's authority

to implement [16 U.S.C. § 824a-3] 210 is admittedly broad")).[2]

III. DISCUSSION

A.

The primary issue before this Court is whether the PUC's rule that a legally enforceable obligation arises only when a qualified facility can deliver power within 90 days runs afoul of PURPA and its associated federal regulations. Pursuant to 16 U.S.C. § 824a-3(a), FERC must promulgate regulations to effectuate PURPA's goal of encouraging the development of cogeneration and small power production facilities. *FERC v. Mississippi*, 456 U.S. at 750-51. In turn, § 824a-3(f) requires state regulatory agencies like the PUC to implement the FERC regulations. *Id.* at 751.

The Supreme Court has held that a state may comply with its obligation to implement PURPA and its associated

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[2] In *Independent Energy*, the Court of Appeals for the Ninth Circuit ultimately concluded that this authority was limited with respect to the exclusive federal authority to certify QFs. 36 F.3d at 856. The opinion reasoned that subsection (f) of § 824a-3 requires states to implement rules promulgated by FERC pursuant to subsection (a) of § 824a-3. *Id.* Subsection (a), in turn, "provides for rules that require utilities to buy and sell electric energy from cogenerating facilities; it does not deal with the standards under which a cogenerating facility will be considered a qualifying facility." *Id.* Therefore, FERC alone must determine which facilities are QFs. In contrast, the conditions under which a LEO arises are related to the rules requiring utilities to purchase energy from QFs for which the state is given wide discretion. The limitations on a state's discretion to implement PURPA and FERC recognized in *Independent Energy* do not, therefore, apply here.

FERC regulations in one of three ways: "by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." *Id.* at 751. Responding to the Court's decision, FERC issued a policy statement in 1983 clarifying that a state may comply with its obligation to implement PURPA "1) through the enactment of laws or regulations at the State level; 2) by application on a case-by-case basis by the State regulatory authority . . . of rules adopted by the FERC; or 3) by any other action reasonably designed to implement [FERC's] rules." *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, 1983 WL 39627 (May 31, 1983).

The FERC regulation that applies to the issue in this case is § 292.304(d), which provides:

> Purchases "as available" or pursuant to a legally enforceable obligation. Each qualifying facility shall have the option either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
>
> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised at the beginning of the specified term, be based on either:
>
> > (i) The avoided costs calculated at the time of delivery; or

> (ii) The avoided costs calculated at the time the obligation is incurred.

18 C.F.R. § 292.304(d). This provision allows QFs to provide energy to utilities either by entering into a contract or pursuant to a LEO. *See Small Power Prod. and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980). FERC has explained: "Use of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility." *Id.* This requirement is FERC's response to the reluctance of traditional electric utilities to purchase power from nontraditional electric generation facilities, a problem identified by Congress which could hinder the development of such nontraditional facilities. *See Windway Tech.* at 10.

The PUC argues that the 90-day rule properly implements the FERC regulation regarding LEOs. The 90-day rule provides, in relevant part, as follows:

> Each electric utility shall purchase energy and capacity from a qualifying facility with a design capacity of 100kw or more within 90 days of being notified by the qualifying facility that such energy and capacity are or will be available, provided that the electric utility has sufficient interconnection facilities available. . . . Nothing in this subsection shall be construed in a manner so as to preclude a qualifying facility from notifying and contracting for energy and/or capacity with a utility prior to 90 days before delivery of such energy and/or capacity.

PUC SUBST. R. 25.242(f)(1)(B). PRG claims that the 90-day rule does not meaningfully implement the FERC regulation's mandate for the option of a legally enforceable obligation. PRG argues that the 90-day rule eviscerates the LEO option for unbuilt QFs, because a new facility cannot be financed and constructed in only 90 days. It claims that denying unbuilt QFs the opportunity "to lock-in a purchase rate prior to the development, financing, and actual construction of the facility, even where the utility has projected a need and the QF can meet that projected need at a rate at or below the utility's avoided cost" denies unbuilt QFs their right to LEOs under PURPA.

PRG has failed to show that PURPA and the FERC regulations mandate that all QFs, including unbuilt ones, must be able to create a LEO at any time. To the contrary, states must provide for legally enforceable obligations as distinct from contractual obligations, but "[i]t is up to the States, not [FERC], to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law." *W. Penn Power Co.*, 71 F.E.R.C. ¶ 61,153, 61,495 (May 8, 1995). *West Penn* and its progeny *Jersey Central Power & Light Co.*, 73 F.E.R.C. ¶ 61,092, 61,297 (Oct. 17, 1995), and *Metropolitan Edison Co.*, 72 F.E.R.C. ¶ 61,015, 61,050 (July 6, 1995), support the proposition that the FERC regulations grant the states discretion in setting specific parameters for LEOs.

Certain states may be more generous than Texas toward QFs in their allowance for the creation of LEOs. We agree with the district court's reasoning that the fact that some states have implemented the FERC regulations pursuant to their respective state laws such that a LEO may arise prior to construction of a QF does not compel

Texas to do so. Other states have concluded that LEOs did not arise when the QF was not completed. *Compare Armco Advanced Materials Corp. v. Pa. Pub. Util. Comm'n,* 579 A.2d 1337 (Pa. Commw. Ct. 1990) (holding that a LEO arises under Pennsylvania law when the QF commits to delivering energy, not at the time of "serious negotiations" between the QF and the facility), *Snow Mountain Pine Co. v. Maudlin,* 734 P.2d 1366, 1371 (Or. Ct. App. 1987) (applying Oregon law and holding that a LEO was created), *A.W. Brown Co., Inc. v. Id. Power Co.,* 828 P.2d 841 (Idaho 1992) (applying Idaho law and holding that a LEO was created), *and N.H. Pub. Util. Comm'n,* 539 A.2d 275 (N.H. 1988) (applying New Hampshire law and holding that a LEO was created), *with Mid-South Cogeneration, Inc. v. Tenn. Valley Auth.,* 926 F. Supp. 1327 (E.D. Tenn. 1996) (finding that no LEO arose under Tennessee law for an unbuilt QF), *and S. River Power Partners, L.P. v. Pa. Pub. Util. Comm'n,* 696 A.2d 926, 932 (Pa. Commw. Ct. 1997) (recognizing that Pennsylvania's Public Utility Commission has adopted standards for when a LEO arises that are more stringent than those adopted by other states, and holding that no LEO had arisen under Pennsylvania law). While these cases reach different outcomes on whether LEOs were created, they collectively support the proposition that FERC has given each state the authority to decide when a LEO arises in that state. Therefore, the regulations of other states regarding LEOs have no bearing on the case *sub judice.*

PRG argues that the 90-day rule completely eviscerates the LEO option mandated by the FERC rule, but PRG makes no such showing. On its face, the 90-day rule implements PURPA and its regulations regarding LEOs by allowing QFs to create LEOs and secure pricing based on

the LEOs, once the QF notifies the purchasing utility that energy will be available from the QF within 90 days. PURPA allows states discretion in determining when a LEO is created, and Texas's 90-day rule falls within that discretion.

PRG points to the Third Circuit's statement that "16 U.S.C. § 824a-3 [of PURPA] requires the FERC to prescribe 'such rules as it determines necessary to encourage cogeneration and small power production,' including rules requiring traditional utilities to purchase electricity from QFs." *Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs,* 44 F.3d 1178, 1183 (3d Cir. 1995) (quoting *FERC v. Mississippi,* 456 U.S. 742, 751 (1982)). The ramifications of this proposition, however, are fatal to PRG's position. If FERC had determined it necessary to set more specific guidelines concerning LEOs, it could have done so. For example, the FERC regulations could have mandated that the QFs must be able to lock in purchase rates with a LEO prior to construction of a facility. The plain text of the FERC regulation, however, fails to mandate that requirement. Rather, defining the parameters for creating a LEO is left to the states and their regulatory agencies.

In sum, in codifying Texas Substantive Rule 25.242(f)(1)(B), the PUC acted within its discretion and properly implemented FERC's regulations regarding when a LEO is created. We affirm the decision of the district court granting summary judgment on this issue to the PUC and TNMP.

B.

PRG also argues that the district court erred in determining that it lacked jurisdiction to grant relief on PRG's as-applied claims. Because we affirm the district court's decision on the 90-day rule issue, the judgment in favor of the PUC and TNMP is upheld and our analysis need go no further.

C.

Finally, we turn to the argument of the PUC and TNMP that the district court could have dismissed this case on grounds of collateral estoppel. The PUC and TNMP, who come before this Court as prevailing parties, did not cross-appeal the district court's decision that collateral estoppel did not bar the implementation claim; rather, they merely raise the issue as an alternative ground upon which this Court could affirm the judgment of the district court. In that we deny PRG relief on its appeal of the district court's decision on implementation, we need not address this issue.

IV. CONCLUSION

Because Texas's 90-day rule regarding LEOs implements PURPA and its associated regulations within the discretion granted to Texas, the decision of the district court granting summary judgment in favor of the PUC and TNMP is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

POWER RESOURCE GROUP, INC.,	§	
Plaintiff,	§	
v.	§	NO. A-03-CA-762-H
PAUL HUDSON, In His Official Capacity as Chairman of the Public Utility Commission of Texas, JULIE PARSLEY, In Her Official Capacity as Commissioner of the Public Utility Commission of Texas, BARRY T. SMITHERMAN, In His Official Capacity as Commissioner of the Public Utility Commission of Texas and TEXAS-NEW MEXICO POWER COMPANY,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

On this day came on to be considered the above-styled and numbered cause. There are three motions currently pending in this case: (1) Power Resource Group Inc.'s ("PRG") motion for judgment on the pleadings, Clerk's Dkt. #51; (2) Defendant Texas-New Mexico Power Company's ("TNMP") cross-motion for dismissal[1], Clerk's Dkt.

[1] TNMP does not specify which authority it relies on in making its cross-motion for dismissal. Since TNMP previously filed a motion to

(Continued on following page)

#54; and (3) Defendants Paul Hudson, Julie Parsley and Barry T. Smitherman's, in their official capacities as Commissioners of the Public Utility Commission of Texas (collectively "Commissioners" or "PUCT"), motion for summary judgment and motion to dismiss, Clerk's Dkt. #56. All three motions center around the single remaining issue before this Court, namely, whether in codifying Texas Substantive Rule 23.66[2], the Public Utility Commission of Texas ("PUCT") fully implemented regulations promulgated by the Federal Energy Regulatory Commission ("FERC") pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA").

I. FACTUAL AND PROCEDURAL HISTORY

The factual and procedural history of this case begins with negotiation and disagreement, winds through the administrative review process of PUCT, proceeds onward through all levels of the Texas state court system, forges into FERC's administrative review procedures and makes a final desperate dive into this Court for federal review of a quite narrow question. As this opinion will show, the protracted journey has now come to an end.

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dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), which the Court subsequently denied in relation to Plaintiff's implementation at issue here, clerk's dkt. #44, and since TNMP asks that judgment be entered in favor of the Defendants and Intervenor, the Court will treat TNMP's motion as a motion for summary judgment under Federal Rule of Civil Procedure 56(b).

[2] PUCT Substantive Rule 23.66(d) was in effect when PRG first sought relief from PUCT. The rule was subsequently amended, though not substantively, and codified in the Texas Administrative Code as Rule 25.242. **See** Tex. Admin. Code § 25.242. For consistency with the parties and previous rulings on this matter, the Court will cite to Rule 23.66.

A brief history of the case is as follows.[3] PRG is a Delaware corporation and an experienced developer of independent power projects. TNMP is a Texas electric utility under the authority of PUCT. Prior to the events at issue, TNMP purchased power from Texas Utilities Electric Company ("TUEC") under a long-term contract. In 1995, TNMP distributed a Request for Proposal for energy capacity to fill the need anticipated for 1999 or 2000. Pl.'s Compl. ¶29. In response, PRG proposed to construct a natural gas-fired combined cycle power generation facility to be located in Lewisville, Texas – known as the Lewisville Project. The parties entered negotiations in March of 1996 related to various options to displace a 265 megawatt portion of TNMP's then-current purchase obligation from TUEC. The Lewisville Project was certified as a Qualifying Facility ("QF") on September 20, 1996. While in the midst of negotiations, PRG secured sources of equity, identified a site and equipment, negotiated a site option and fuel supply options, negotiated purchase and thermal host agreements, held zoning discussions, engaged an engineering firm, and assessed environmental permitting. Pl.'s Compl. ¶35. After several earlier proposed contracts, PRG made its final written commitment in the form of a signed contract on February 13, 1998. TNMP refused to execute a contract and, instead, renegotiated with TUEC.

On August 7, 1998, PRG filed a petition with PUCT asking that TNMP be ordered either to contract with PRG

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[3] A full review of the factual and procedural history of this case can be found in this Court's order of February 18, 2004. *Power Res. Group, Inc. v. Klein*, No. A-03-CA-762-H (W.D. Tex. Feb. 18, 2004) (granting in part and denying in part Defendants' and Intervenor's motions to dismiss. Clerk's Dkt. #44).

or simply to purchase power from the Lewisville Project. In assessing PRG's petition, PUCT interpreted the relevant rule, Texas Substantive Rule 23.66, to require utilities to purchase from a QF only if the QF could deliver power within 90 days of notifying the utility that energy would be available. On March 25, 1999, PUCT dismissed PRG's petition without prejudice stating, "TNMP is not obligated under PUC Subst. R. 23.66 to contract with PRG to purchase power and capacity from [the Lewisville Project], because PRG could not deliver power or capacity from [the Lewisville Project] to TNMP within 90 days after PRG's final offer on January 2, 1998." Order of Mar. 25, 1999, P.U.C. Docket No. 19715, Intervenor's Mot. to Dismiss Ex. A. PRG sought review of PUCT's order in the 345th Judicial District Court of Travis County, Texas.

The Texas District Court affirmed PUCT's final order on March 8, 2001. *Power Res. Group, Inc. v. Pub. Util. Comm'n. of Tex.*, No. 99-06000 at 1 (Tex. Dist. Ct., 345th Jud. Div. Mar. 8, 2001). PRG promptly appealed the ruling to the court of Appeals for the Third District of Texas, at Austin. On January 10, 2002, the Texas Court of Appeals affirmed both the Texas District Court and PUCT stating that "the Commission's interpretation of rule 23.66(d) is reasonable and not preempted by federal law and that the Commission did not act arbitrarily or capriciously in refusing to compel TNMP to contract with Power Resource." *Power Res. Group, Inc. v. Pub. Util. Comm'n of Tex.*, 73 S.W.3d 354, 363 (Tex. App. – Austin 2002). PRG then petitioned for review by the Texas Supreme Court, but that petition was denied on October 10, 2002.

Subsequently, PRG petitioned FERC pursuant to PURPA section 210(h)(2)(B) and requested that FERC undertake an enforcement action against PUCT for its

failure to implement the full regulatory scheme required under PURPA. 16 U.S.C. § 824a-3(h)(2)(B). After sixty days, FERC had not acted on PRG's petition, and on October 20, 2003, responding to FERC's lack of action as authorized under section 210(h)(2)(B), PRG filed its complaint in this Court. On February 18, 2004, in ruling on both Defendant Commissioners' and Intervenor's motions to dismiss, this Court dismissed all of Plaintiff's claims, save one. The discrete issue remaining before the Court is whether PUCT Substantive Rule 23.66 fully implemented section 292.304(d)(2) of FERC's regulations to properly allow for the existence of a legally enforceable obligation ("LEO"), separate and apart from the existence of a contractual obligation between a QF under PURPA and an electric utility. *See* 18 C.F.R. § 292.304(d)(2); Mot. of PRG for J. on the Pleadings and Supp. Br. (hereinafter "Pl.'s Mot. for J. on the Pleadings") 8-9; Intervenor's Resp. to PRG's Mot. for J. on the Pleadings & Intervenor's Cross-Mot. for Dismissal (hereinafter "TNMP's Resp. & Mot. for Dismissal") 8-9; Pub. Util. Comm'nrs of Tex. Mot. for Summ. J., Mot. to Dismiss for Lack of Jurisdiction and Resp. to Pl.'s Mot. for J. on the Pleadings (hereinafter "Comm'nrs Resp., Mot. to Dismiss & Mot. for Summ. J.") 4-7.

Plaintiff argues that the adequacy of state implementation of PURPA is a question of law, properly decided by this Court on the basis of the pleadings. TNMP has responded by arguing: (1) this Court has no subject matter jurisdiction; and (2) that, even assuming subject matter jurisdiction, PUCT has in fact sufficiently implemented the FERC LEO provision. PUCT has responded, somewhat similarly to TNMP, by arguing; (1) this Court is barred from considering Plaintiff's claim by the doctrine of

collateral estoppel; and (2) that, alternatively, PUCT Substantive Rule 23.66 properly implements the FERC regulations because the states, not QFs, determine what a LEO arises.

II. JURISDICTION

TNMP asserts that the provision of PURPA providing this Court with jurisdiction, 16 U.S.C. § 824a-3(h)(2)(B), allows only a review of whether the FERC regulations have been "implemented," and that implementation requires as little as "state commissions . . . undertaking to resolve disputes between qualifying facilities and electric utilities under [PURPA]." TNMP's Resp. & Mot. to Dismiss 3 (quoting *FERC v. Mississippi*, 456 U.S. 742, 760, 102 S. Ct. 2126 (1982); 18 C.F.R. § 292.401(a) (1980)). TNMP's argument continues that, since PRG has already had an opportunity to air its grievances in front of not only the PUCT but the Texas state courts as well, the mandates of PURPA, as enunciated by the Supreme Court in *FERC v. Mississippi*, have been satisfied and this Court lacks jurisdiction to proceed further. The Court disagrees.

The Supreme Court's analysis of PURPA in *FERC v. Mississippi* focused on whether PURPA's directive requiring that states implement the FERC regulations, 16 U.S.C, § 824a-3(f), violated the Tenth Amendment. 456 U.S. at 758-60; U.S. CONST. amend. X. Section 824a-3(f) states that "each State regulatory authority shall, after notice and opportunity for public hearing, implement such [FERC] rule (or revised rule) for each electric utility for which it has ratemaking authority." 16 U.S.C. § 824a-3(f)(1)(a). The Supreme Court expressed concern over the "shall" language which could potentially require the state

authorities to adopt rules, promulgated by the federal government, requiring specific state conduct. In finding the PURPA's implementation mandate did not violate the Tenth Amendment, the Supreme Court made clear that FERC expressly allowed a state to "implement" PURPA under 16 U.S.C. § 824a-3(f) "simply by opening its doors to claimants." *FERC v. Mississippi*, 456 U.S. at 760 (citing 18 C.F.R. § 292.401(a)). The latitude granted to states by FERC regarding implementation, however, did not include discretion to fail or refuse to enact certain provisions of PURPA. *See id.* at 764 (commenting that, while a difficult choice, a state could choose not to have a public utility commission and, therefore, remove itself from the demands of PURPA). Reading the two principles together, if a state "implements" PURPA by opening its courthouse doors to claimants but selectively enforces only certain provisions of PURPA and corresponding FERC regulations, section 824a-3(f) is violated because the state failed to fully implement the regulations, and a district court would have subject matter jurisdiction over a resulting claim based on section 824a-3(h)(2)(B). Such is the case here, and this Court has proper subject matter jurisdiction to determine whether: (1) PUCT implemented the LEO provision of the FERC regulations by providing dispute resolution at both the PUCT and state court levels; or (2) whether the forum provided in Texas has been deaf to disputes over the existence of a LEO due to PUCT's failure to implement section 824a-3(f).

While the Court has subject matter jurisdiction to determine PRG's implementation claim, it must be cognizant of the restrictions imposed upon it by the Eleventh Amendment. U.S. CONST. amend. XI. The Eleventh Amendment generally divests federal courts or jurisdiction

to entertain suits directed against states and state officers in their official capacities. *Cox v. City of Dallas*, 256 F.3d 281, 307 (5th Cir. 2001) (citing *Stem v. Ahearn*, 908 F.2d 1, 3 (5th Cir. 1990)); *Green v. State Bar of Texas*, 27 F.3d 1083, 1087 (5th Cir. 1994) (citing *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 110 S. Ct. 1868, 1871 (1990)). The *Ex parte Young* doctrine provides a narrow exception allowing suits for prospective injunctive or declaratory relief against state officials acting in their official capacities when the plaintiff is alleging that the state official is acting in violation of the Constitution or federal law. *Cox*, 256 F.2d at 307 (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). In an order dated February 18, 2004, this Court painstakingly applied the *Ex Party* [sic] *Young* doctrine and elucidated precisely the single, narrow claim presented by PRG which met its stringent criteria. Order at 19-22 (Feb. 18, 2004, Clerk's Dkt. #44). PRG has apparently ignored the Court's order and analysis.

PRG again asks this Court to grant relief in the form of an order directing PUCT to consider PRG's claims under a revised system of regulation. Pl.'s Mot. for J. on the Pleadings 10. These allegations state an "as applied" claim, which this Court has **no jurisdiction to hear**. *See* 16 U.S.C. § 824a-3(g). Therefore, as was the case on February 18, 2004, the one ultimate and limited issue before the Court at this time is whether PUCT failed to implement the LEO option provided by FERC's regulations. 18 C.F.R. § 292.304(d)(2).

III. COLLATERAL ESTOPPEL

Collateral estoppel is slightly narrower than res judicata in that the doctrine will bar relitigation of any issue actually litigated and essential to the judgment, rather than operating to bar an entire action. *See Bonniwell v. Beach Aircraft Corp.*, 663 S.W2d 816, 819 (Tex. 1984). Collateral estoppel will bar relitigation of an ultimate issue of fact: (1) if the facts to be litigated in the second action were "fully and fairly litigated in the prior action;" (2) if the facts previously litigated were essential to the judgment in the first action; and (3) if the parties were cast as adversaries in the first action. *Id.* at 818. Additionally, collateral estoppel will operate to bar issues from reconsideration "irrespective of whether the claims being asserted are within the exclusive jurisdiction of the federal courts." *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 83 F. Supp. 2d 781, 793 (E.D. Tex. 2000). Thus, the key issue under the collateral estoppel doctrine will be whether the facts relevant to the instant action were actually fully and fairly litigated in state court.

"An issue is 'actually litigated' for collateral estoppel purposes if it is 'properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'" *Id.* In its second amended petition in Texas state court, PRG requested that the District Court: (1) reverse and remand the PUCT order which dismissed PRG's complaint; (2) "enter a declaratory judgment that the PUCT's application of Substantive Rule § 23.66(d)(1)(C) improperly interferes with and impairs Plaintiff's legal right"; (3) grant specific performance requiring TNMP to purchase energy; (4) award damages for breach of contract; and (5) award damages for fraud. Pl.'s Second Am.

Pet., No. 99-06000, Intervenor's Mot. to Dismiss Ex. B. While it is clear that PRG did argue that Substantive Rule 23.66 conflicted with PURPA, it appears equally clear that PRG presented the state court with an "as applied" claim, rather than an implementation claim. *See id.* at ¶¶14, 22. Application of state regulations is solely and properly the province of the state courts. See *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1234 (D.C. Cir. 1995). PRG did not argue the implementation issue in the state trial court and could not have raised it for the first time on appeal. Therefore, the issue of LEO implementation in the State of Texas has yet to be fully and fairly litigated, and collateral estoppel will not bar consideration of PRG's narrow implementation claim.[4] *See Piggly Wiggly*, 83 F. Supp. 2d at 793-94 ("Importantly, collateral estoppel extends only to matters that were actually adjudicated in an earlier lawsuit and not to matters that might have been raised. . . . This is pivotal because collateral estoppel only precludes the relitigation of *identical* issues of fact or law that were actually litigated.") (emphasis in original).

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[4] The Texas Court of Appeals held:

> Because we hold that rule 23.66 is not preempted by federal law and the Commission was within its authority to determine that a legally enforceable obligation does not exist unless the qualifying facility is capable of providing energy within ninety days of notifying the utility of its qualifying facility status, we overrule Power Resource's third point of error. Because of our disposition on this point of error, we need not address Power Resource's point of error one, two, four, and five.

Power Res. Group, Inc. v. Pub. Util. Comm'n, 73 S.W.3d 354, 361-62 (Tex. App. – Austin 2002). The language quoted above is clearly related to an "as applied" claim. The Texas Court of Appeals, in determining that no LEO existed under Rule 23.66 as applied to PRG's specific situation, ruled that PUCT was within its authority.

IV. STANDARD OF REVIEW

A. Judgment on the Pleadings

Federal Rule of Civil Procedure 12(c) provides that, "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). Judgment on the pleadings under Rule 12(c) is appropriate when the "material facts are not in dispute and judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002) (quoting *Herbert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990)). The pleadings are to be construed liberally, and a district court may only dismiss a claim where it is clear that "the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Great Plains Trust*, 313 F.3d at 312-13. The Fifth Circuit has found disposition of a case by judgment on the pleadings appropriate where the facts of a case were not in dispute and the only question presented to the district court was one of statutory interpretation. *See Herbert Abstract*, 914 F.2d at 76.

B. Summary Judgment

A court should grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "An issue is 'material' if it involves a fact that might affect the outcome of the suit under the governing law." *Burgos v. Southwestern Bell Tel.*

Co., 20 F.3d 633, 635 (5th Cir. 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986)). Summary judgments involve a shifting burden of proof. First, the movant bears the burden of informing the court of the evidentiary basis for its motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986). Next, the nonmoving party must respond by presenting affirmative evidence, setting forth specific facts, to show the existence of a genuine issue of material fact. *See id.* at 322-23. In evaluating a summary judgment motion, this Court "is required to resolve all reasonable doubts and draw all reasonable inferences in favor of the nonmoving party, and then determine whether the movant is entitled to judgment as a matter of law." *Burgos*, 20 F.3d at 635.

V. IMPLEMENTATION OF 18 C.F.R. § 292.304(d)(2)

Plaintiff PRG has moved for judgment on the pleadings asserting it is clear and indisputable Texas Substantive Rule 23.66 fails to implement PURPA. Defendants and Intervenor are seeking judgment based on the opposite conclusion, that PUCT's promulgation of Texas Substantive Rule 23.66 fully satisfies any state implementation obligation under PURPA and FERC regulations, and Plaintiff cannot show any facts entitling it to relief, so, therefore, Defendants and Intervenor are entitled to judgment as a matter of law. The text of the FERC regulation constituting the central issue in this matter reads:

> (d) Purchases 'as available' or pursuant to a legally enforceable obligation. Each qualifying facility shall have the option either:

> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
>
> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> > (i) The avoided costs calculated at the time of delivery; or
> >
> > (ii) The avoided costs calculated at the time the obligation is incurred.

18 C.F.R. § 292.304(d). In a publication issued February 19, 1980, FERC elaborated on the purpose and operation of many of its regulations. It is clear from the face of the regulation that paragraph (d)(2) permits a qualifying facility to provide energy over a specified term either by entering into a contract or a legally enforceable obligation. 45 Fed. Reg. 12224. FERC further explained that, "Use of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility." 45 Fed. Reg. 12224 (1980). Thus, PRG's contention that a LEO is separate and distinct from a contractual obligation is clearly supported by FERC's regulations.

While a state must therefore provide for a legally enforceable obligation separate from a contractual one, "It is up to the States, not [FERC], to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law." *West Penn Power Co.*, 71 F.E.R.C, 61,153, 61,495 (May 8, 1995); *see also Metro. Edison Co.*, 72 F.E.R.C. 61,015, 61,050 (July 6, 1995) ("For purposes of our regulations, the critical date is the date on which a legally enforceable obligation is incurred, and choosing that date for a specific QF is the responsibility of the States, not of [FERC]."") (quoting *West Penn Power*, 71 F.E.R.C, at 61,496). Existence of a legally enforceable obligation and the time of its occurrence are fact questions properly left to a state regulatory authority to decide in the first instance. *Jersey Cent. Power & Light Co.*, 73 F.E.R.C. 61,092, 61,297 (Oct. 17, 1995); *see Mid-South Cogeneration, Inc. v. Tenn. Valley Auth.*, 926 F. Supp. 1327, 1337 (E.D. Tenn. 1996) (finding no LEO under Tennessee state law where the QF facility was "unfinished [and] not ready to generate electric energy for delivery"); *see also South River Power Partners, L.P. v. Pa. Pub. Util. Comm'n*, 696 A.2d 926 (Pa. 1997) (applying Pennsylvania state law to determine that no legally enforceable obligation had been created in Pennsylvania even though other states, applying a more lax standard, might have found such a legally enforceable obligation). PUCT Substantive Rule 23.66 reads:

> Each electric utility shall purchase energy and capacity from a qualifying facility with a design capacity of 100kw or more within 90 days of being notified by the qualifying facility that such energy and capacity are or will be available provided that the electric utility has sufficient

> interconnection facilities available. If an agreement to purchase energy and capacity is not reached within 90 days after the qualifying facility provides such notification, the agreement, if and when achieved, shall bear a retroactive effective date for the purchase of energy (and capacity) delivered to the electric utility correspondent with the 90th day following such notice.

P.U.C. SUBST. R. 23.66(d), currently codified at P.U.C. SUBST. R. 25.242(f)(1)(B). The Court reads the above provision, as do the parties, to provide for a legally enforceable obligation when a QF can deliver energy and capacity within 90 days of notifying an electric utility. PRG strenuously asserts that the Texas Rule violates PURPA because no financier could determine the costs and benefits associated with building a QF before construction. Much of what PRG says in its motion for judgment on the pleadings is technically true but unpersuasive to its claim: FERC did intend for a LEO to be distinct from a contractual obligation, a LEO can arise even when a utility refuses to enter into a bilateral contract with a QF, the QF is granted the power to decide whether a utility's avoided costs will be calculated at the time power is delivered or at the time of a LEO, and finally, some state courts have recognized that a QF's ability to lock in a rate prior to the time of delivery can be essential to encouraging QF development. While Plaintiff's assertions are true, they rely on state law outside of the State of Texas and thus do not conflict with the rule this Court must follow here: that Texas state law determines when a LEO is incurred in the State of Texas. *See, e.g., Metro Edison Co.*, 72 F.E.R.C. 61,015; *West Penn*, 71 F.E.R.C. 61, 153.

The State of Texas, through PUCT, has chosen to provide a LEO when a QF can deliver power or capacity

within 90 days. It is PUCT's prerogative to do so. Because Texas Substantive Rule 23.66 implements FERC's regulation regarding when a LEO may be incurred, this Court's analysis can go no further. While other states may provide for longer-term LEOs, Texas law does not, and the cases cited by Plaintiff are merely comprehensive discussions of the law applicable to and applied by the public utility commissions of other states. *See Armco Advanced Materials Corp. v. Pa. Pub. Util. Comm'n*, 579 A.2d 1337 (1990) (applying Pennsylvania law); *Snow Mountain Pine Co. v. Mandlin*, 734 P.2d 1366, 1371 (Ore. App. 1987) (applying Oregon law); *A.W. Brown Co. v. Id. Power Co.*, 828 P.2d 841 (Id. 1992) (applying Idaho law); *N.H. Pub. Util. Comm'n*, 539 A.2d 275 (N.H. 1988) (applying New Hampshire law). *But see Mid-South Cogenerators*, 926 F. Supp. at 1337 (affirming the finding of no LEO for an unconstructed QF under Tennessee law); *South River Power Partners*, 696 A.2d at 931-32 (affirming application of Pennsylvania state law finding no LEO and acknowledging that Pennsylvania's LEO requirements were more stringent than other states).

In sum, the facts in this case are undisputed. Plaintiff's attempt to show that Texas' implementation of PURPA was deficient failed in light of prevailing law. Thus, Defendants and Intervenor have carried their burden of showing they are entitled to judgment as a matter of law. Plaintiff can show no set of facts which could entitle it to relief. Therefore, the Court finds the following order should be entered.

It is therefore ORDERED that Plaintiff Power Resource Group Inc.'s motion for judgment on the pleadings be, and it is hereby, DENIED.

It is further ORDERED that Intervenor Texas-New Mexico Power Company's motion for dismissal be, and it is hereby, GRANTED.

It is further ORDERED that Defendants Hudson, Parsley and Smitherman's, in their official capacities as Commissioners of the Public Utility Commission of Texas, motion for summary judgment be, and it is hereby, GRANTED.

It is further ORDERED that judgment be, and it is hereby, ENTERED in favor of Defendants Hudson, Parsley and Smitherman, in their official capacities as Commissioners of the Public Utility Commission of Texas, and Intervenor Texas-New Mexico Power Company with respect to all claims asserted by Plaintiff, and that the Plaintiff Power Resource Group take nothing by its suit.

SIGNED AND ENTERED this 15th day of July, 2004.

/s/
HARRY LEE HUDSPETH
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

POWER RESOURCE GROUP, INC.,	§	
Plaintiff,	§	
v.	§	NO. A-03-CA-762-H
REBECCA KLEIN, In Her Official Capacity as Chairman of the Public Utility Commission of Texas, JULIE PARSLEY, In Her Official Capacity as Commissioner of the Public Utility Commission of Texas, PAUL HUDSON, In His Official Capacity as Commissioner of the Public Utility Commission of Texas and TEXAS-NEW MEXICO POWER COMPANY,	§	
Defendants.	§	

ORDER

On this day came on to be considered Defendants Rebecca Klein[1], Julie Parsley and Paul Hudson's (collectively "Commissioners") motion to dismiss amended complaint (Clerk's Dkt. #15) and Intervenor Texas New Mexico Power Company's ("TNMP") motion to dismiss (Clerk's Dkt. #11) in the above-styled and numbered cause.

[1] Commissioner Klein has resigned as Chairman of the Public Utility Commission of Texas, effective January 16, 2004. Thus, her successor will automatically be substituted as a party. Fed. R. Civ. P. 25(d)(1).

This case arises out of allegations brought by Power Resource Group, Inc. ("PRG") that the Commissioners violated the Public Utilities Regulatory Policy Act of 1978 ("PURPA") by failing to pass regulations which fully implemented the federal statute.

"PURPA was enacted as part of an effort to combat the nationwide energy crisis by reducing the dependence of electric utilities on foreign oil and natural gas." Pl.'s Compl. ¶7. Part of PURPA encouraged the development of alternative energy sources such as cogeneration and small power production facilities. Facilities which qualified for the PURPA's protections and benefits are termed "qualifying facilities" or "QF's."

PURPA directed the Federal Energy Regulatory Commission ("FERC") to adopt regulations that would promote energy purchase from QF's. State regulatory agencies were then directed to adopt rules which complied with FERC's requirements and which fully implemented PURPA in each state. 16 U.S.C. § 824a-3(f). The Texas rule at issue here controls when a utility must purchase power from a QF, rather than producing the power itself or purchasing it from an alternative source, and PRG avers that the Texas rule fails to fully implement FERC regulations and does not meet the demands of PURPA.

I. FACTS AND PROCEDURAL HISTORY

PRG is a Delaware corporation and is an experienced developer of independent power projects. TNMP is a Texas electric utility under the authority of the Texas Public Utility Commission ("PUC"). Prior to the events at issue, TNMP purchased power from Texas Utilities Electric Company ("TUEC") under a long-term contract. In 1995,

TNMP distributed a Request for Proposal for energy capacity to fill the need anticipated for 1999 or 2000. Pl.'s Compl. ¶29. In response, PRG proposed to construct a natural gas-fired combined cycle power generation facility to be located in Lewisville, Texas – the Lewisville Power Project ("LPP" or "Lewisville Project"). The parties entered negotiations in March of 1996 related to various options to displace a 265 megawatt portion of TNMP's then-current purchase obligation from TUEC. The Lewisville Project was certified as a "QF" on September 20, 1996 pursuant to 18 C.F.R. § 292.207(a)(1), certification number QF 96-120-000. While negotiations were on-going, PRG secured sources of equity, identified a site and equipment, negotiated a site option and fuel supply options, negotiated purchase and thermal host agreements, held zoning discussions, engaged an engineering firm, and assessed environmental permitting. Pl.'s Compl. ¶35. After several earlier proposed contracts, PRG made its final written commitment in the form of a signed contract on February 13, 1998. TNMP refused to execute any contract and, instead, renegotiated with TUEC at a higher rate than was offered by PRG.

On August 7, 1998, PRG filed a petition with the Texas PUC asking the PUC to order TNMP to contract with PRG for the purchase of power from the Lewisville Project or to grant relief appropriate to enforce those rights and to require TNMP to purchase power from the Lewisville Project. Under the applicable rule – at that time P.U.C. Subst. R. 23.66(d), currently codified at P.U.C. Subst. R. 25.242(f)(1)(B) – as interpreted by the Texas PUC, utilities were required to purchase from a QF only if the QF could deliver power within 90 days of notifying the utility that energy would be available. On March 25, 1999,

the Texas PUC dismissed PRG's petition without prejudice stating, "TNMP is not obligated under PUC Subst. R. 23.66 to contract with PRG to purchase power and capacity from LPP, because PRG could not deliver power or capacity from LPP to TNMP within 90 days after PRG's final offer on January 2, 1998." Order of Mar. 25, 1999, PUC Docket No. 19715, Intervenor's Mot. to Dismiss Ex. A. PRG sought judicial review of the PUC's order in the 345th Judicial District Court of Travis County, Texas.

The Texas District Court affirmed the final order of the PUC on March 8, 2001, stating, "The Court, at the conclusion of the hearing, after reviewing the pleadings, the administrative record, briefs and having heard the arguments of counsel, finds that agency order under review in this cause should be in all things affirmed." *Power Res. Group, Inc. v. Pub. Util. Comm'n of Tex.*, No. 99-06000 at 1 (Tex. Dist. Ct., 345th Jud. Div. Mar. 8, 2001). PRG promptly appealed the ruling to the court of Appeals for the Third District of Texas, at Austin. On January 10, 2002, the Texas Court of Appeals affirmed both the Texas District Court and the PUC stating that "the Commission's interpretation of rule 23.66(d) is reasonable and not preempted by federal law and that the Commission did not act arbitrarily or capriciously in refusing to compel TNMP to contract with Power Resource." *Power Res. Group, Inc. v. Pub. Util. Comm'n of Tex.*, 73 S.W.3d 354, 363 (Tex. App. – Austin 2002). PRG then petitioned for review by the Texas Supreme Court, and that petition was denied on October 10, 2002.

Subsequently, PRG petitioned FERC pursuant to PURPA section 210(h)(2)(B) and requested that FERC undertake an enforcement action against the Texas PUC for its failure to implement the full regulatory scheme

required under PURPA. 16 U.S.C. § 824a-3(h)(2)(B). After sixty days, FERC had still not acted on PRG's petition. On October 20, 2003, PRG filed the instant complaint in this Court as authorized under section 210(h)(2)(B).

In its complaint, PRG argues that once FERC has declined to bring an enforcement action, section 210(h)(2)(B) gives federal district courts exclusive jurisdiction over the question of proper state implementation of PURPA. The Commissioners and TNMP, in their motions to dismiss, argue that by pursuing a remedy in state court for the PUC's failure to implement PURPA, PRG is barred from seeking review in federal court. The Commissioners and TNMP argue that, once the Texas PUC construed Texas rule 23.66 in its administrative hearing, PRG had a final construction of the rule which could be the subject of a claim under section 824a-3(h)(2)(B), but that PRG chose instead to pursue its claim in the state courts. Specifically, the motions to dismiss present four distinct arguments: (1) the Rooker-Feldman doctrine bars review of this claim in federal district court because proper review of PRG's federal question was available via a petition for certiorari to the U.S. Supreme Court; (2) because the Texas state courts have decided the issues presented in the instant case, the doctrines of res judicata and/or collateral estoppel bar these same claims in federal court; (3) PRG has no standing under section 210(h)(2)(B) because it is not a "qualifying cogenerator, or qualifying small power producer" under the statute; and (4) sovereign immunity bars pursuit of this claim in federal court. In response, PRG argues that the Rooker-Feldman, res judicata and collateral estoppel arguments are inapplicable here because the federal courts have exclusive jurisdiction. Additionally, PRG states that, as a certified QF, it does have standing to

bring this action and that the prospective injunctive relief requested does not run afoul of sovereign immunity.

II. STANDARD OF REVIEW

The strict standard of review under Rule 12(b)(6)[2] has been summarized as follows: "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 601 (2d Ed. 1969); *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). In making this examination, the district court may not go outside the pleadings and must accept all well-pleaded facts as true, viewing them in a light most favorable to the Plaintiffs. *Partridge v. Two Unknown Officers*, 791 F.2d 1182, 1185-86 (5th Cir. 1986); *O'Quinn v. Manuel*, 773 F.2d 605, 608 (5th Cir. 1985). Ultimately, the district court may not dismiss a complaint under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *See also Worsham v. City of Pasadena*, 881 F.2d 1336, 1339 (5th Cir. 1989); *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989).

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[2] While Intervenor TNMP clearly brings its motion to dismiss under FED. R. CIV. P. 12(b)(6), Defendant Commissioners have simply filed their motion "pursuant to Rule 12 of the Federal Rules of Civil Procedure." Mot. to Dismiss 1 (Clerk Dkt. #14). The Court will treat this as a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6).

III. DISCUSSION

Effect of Exclusive Federal Jurisdiction on Rooker-Feldman, Res Judicata & Collateral Estoppel Arguments

Under the Rooker-Feldman doctrine, a losing party in state court is "barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy*, 512 U.S. 997, 1005 (1994) (citing *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 416 (1923)). The Rooker-Feldman doctrine thus recognizes that a grant of original jurisdiction in the federal courts "does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to [the U.S. Supreme] Court, see 28 U.S.C. § 1257(a)." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 (2002). However, where the federal courts have exclusive jurisdiction, as PRG argues is true in this case, the Rooker-Feldman doctrine does not apply and the federal forum will hear the matter in the first instance, not in an appellate capacity.

The full faith and credit statute requires a federal district court, applying the doctrines of res judicata and collateral estoppel, to give state court judgments the same preclusive effect they would have in the rendering state. 28 U.S.C. § 1738, *Marrese v. Am. Acad. Of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). In Texas, res judicata precludes relitigation of all issues in a cause of action where: (1) there has been a prior final judgment on the merits by a court of competent jurisdiction; (2) there is an identity of parties or those in privity with them; and (3) the second action is based on the same claims that either

were raised, or could have been raised, in the first action. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 816, 819 (Tex. 1996). The first factor is the most crucial in this case. If jurisdiction over PRG's instant claim is exclusively federal, then the Texas state courts would not be courts of competent jurisdiction, and their determinations would not be preclusive. *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 83 F. Supp. 2d 781, 790 (E.D. Tex. 2000).

Collateral estoppel is slightly narrower than res judicata in that the doctrine will bar relitigation of any issue actually litigated and essential to the judgment, rather than operating to bar an entire action. *See Bonniwell v. Beach Aircraft Corp.*, 663 S.W.2d 816, 819 (Tex. 1984). Collateral estoppel will bar relitigation of an ultimate issue of fact: (1) if the facts to be litigated in the second action were "fully and fairly litigated in the prior action;" (2) if the facts previously litigated were essential to the judgment in the first action; and (3) if the parties were cast as adversaries in the first action. *Id.* at 818. Additionally, collateral estoppel will operate to bar issues from reconsideration "irrespective of whether the claims being asserted are within the exclusive jurisdiction of the federal courts." *Piggly Wiggly*, 83 F. Supp. 2d at 793. Thus, the key issue under the collateral estoppel doctrine will be whether the facts relevant to the instant action were actually fully and fairly litigated in state court.

A. JURISDICTION UNDER PURPA

Under the Federal Power Act ("FPA"), FERC is responsible for regulating public utilities that offer electric

power in interstate commerce. *See Crossroads Cogeneration Corp. v. Orange & Rockland Util., Inc.*, 159 F.3d 129, 132 (3d Cir. 1998). Congress passed PURPA as part of a package of legislation[3] designed to combat the nationwide energy crisis. *See FERC v. Mississippi*, 456 U.S. 742, 742 (1982). PURPA modified the FPA as part of "Congress' overall strategy [] to 'control power generation costs and ensure long-term economic growth by reducing the nation's reliance on oil and gas and increasing the use of more abundant, domestically produced fuels.'" *Crossroads*, 159 F.3d at 132 (quoting *Freehold Cogeneration Assoc., L.P. v. Bd. Of Regulatory Comm'rs of N.J.*, 44 F.3d 1178, 1182 (3d Cir. 1995)). Section 210 of PURPA was specifically designed to encourage the development of cogeneration facilities and small power production facilities. Section (a) requires FERC to prescribe rules pursuant to PURPA which encourage cogeneration and small power production. Section (f) then mandates that each State regulatory authority implement the rules proscribed by FERC for each electric utility for which it has ratemaking authority. 16 U.S.C. § 824a-3(f)(1). This flexible yet complex dual-sovereign scheme of implementation has caused considerable confusion related to enforcement of PURPA, and it is the enforcement provisions of section 210 which are at issue in this case.

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[3] *Windway Tech., Inc. v. Midland Power Coop.*, 2001 U.S. Dist. LEXIS 3430 *11 n.3 (N. D. Iowa Mar. 5, 2001) ("The legislation package also included the Energy Tax Act of 1978, Pub. L. 95-618, 92 Stat. 3174; the National Energy Conservation Policy Act, Pub. L. 95-619, 92 Stat. 3206; the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289; and the Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3351.").

1. Enforcement Provisions of PURPA

The enforcement scheme enacted under PURPA is multi-layered. The type of claim brought by the petitioner will determine whether state court, the FERC or federal district court is the appropriate forum under the statute. Section 210(g) provides for state court review of state rules and regulations promulgated by state regulatory authorities to implement PURPA and permits state court actions to enforce the requirements set out by state regulatory authorities. *Windway*, 2001 U.S. Dist. LEXIS 3430 at *14. "Section 210(h)(1) provides that for enforcement purposes, rules and regulations promulgated pursuant to PURPA shall be treated like the Federal Power Act ("FPA") rules, which are enforceable by FERC in federal district court." *Id.* at *15. Finally, section 210(h)(2)(B) allows any "electric utility, qualifying cogenerator, or qualifying small power producer" to petition FERC to bring an enforcement action against a state regulatory authority. If FERC declines to pursue such an enforcement action within 60 days following the date the petition was filed, the petitioner is authorized under section 210(h)(2)(B) to "bring an action in the appropriate United States district court to require such State regulatory authority . . . to comply with such requirements." 16 U.S.C. § 824a-3(h)(2)(B).

While the enforcement scheme is admittedly complex, it is clear that jurisdiction of the federal district court is only appropriate if two conditions are met. First, a party must petition FERC to bring an enforcement action prior to filing suit in federal court. Failure to pursue this administrative remedy is fatal to a claim in federal district court under section 210(h)(2)(B). *See e.g., Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1267 (2d Cir. 2002). Second, the issue presented to the federal court must be

one which challenges the state regulations as an illegal implementation of PURPA and the FERC regulations. The federal courts do not have jurisdiction to hear a petitioner's claim that a state rule is illegal under PURPA "as applied" by the state regulatory authority – that question is strictly the province of the state courts. *See Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1234 (D.C. Cir, 1995), *Mass. Inst. Of Tech. (MIT) v. Mass. Dep't of Pub. Utils.*, 941 F. Supp. 233, 236 (D. Mass 1996), *Greensboro Lumber Co. v. Ga. Power Co.*, 643 F. Supp. 1345, 1374 (N.D. Ga. 1986). "An implementation claim involves a contention that the state agency . . . has failed to implement a lawful implementation plan under § 824a-3(f) of the PURPA, whereas an 'as applied' claim involves a contention that the state agency's . . . implementation plan is unlawful, as it applies to or affects an individual petitioner." *Windway*, 2001 U.S. Dist. LEXIS 3430 at *17 (citing *MIT*, 941 F. Supp. at 237; *Greensboro Lumber*, 64 F. Supp. at 1374).

Once it is determined that a petitioner has averred an implementation claim, however, federal jurisdiction is exclusive. *Indus. Cogenerators*, 47 F.3d at 1235-36 ("Congress created in § 210 a complete and independent scheme by which the purposes of PURPA are to be realized. That scheme involves the promulgation of regulations by FERC, and their subsequent enforcement **exclusively in federal district court**, at the insistence of either a private party or of the FERC itself.") (emphasis added). It is clear that section 210 creates an enforcement scheme by which either FERC or a private party may see to it that a state regulatory agency complies with PURPA, and "[i]n either event, the enforcement action must be brought

in federal district court." *Id.* at 1234 (citing 16 U.S.C. §§ 824a-3(h)(1), (2)(A)).

Jurisdiction for enforcement actions lies exclusively with the federal courts due to language in PURPA stating that, for the purpose of enforcement, a rule implementing PURPA "shall be treated as a rule under the Federal Power Act." 16 U.S.C. § 824a-3(h)(1). Jurisdiction under the FPA is clear: "The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty." 16 U.S.C. § 825p.

B. PRG'S CLAIM

1. FERC Petition for Enforcement Action

As stated, a party must petition FERC to bring an enforcement action before properly bringing its own claim in federal district court. In the instant matter, PRG did petition FERC, asking it to bring an action against the Texas PUC for failure to properly implement PURPA. Specifically, PRG argued that the Texas PUC had failed to implement PURPA by adopting rules which did not fully effectuate the Legally Enforceable Obligation provision of the FERC regulations. FERC did not pursue an enforcement action, and PRG filed the instant matter in this Court pursuant to section 210(h)(2)(B). 16 U.S.C. § 824a-3(h)(2)(B). Thus, PRG has fully exhausted its administrative remedy with FERC as required under PURPA.

2. Is PRG's Action An "Implementation" Claim?

Courts faced with determining jurisdiction under section 210(h) of PURPA have distinguished between claims challenging the implementation of FERC regulations and/or state regulations and claims challenging the application of such regulations. *See e.g., Indus. Cogenerators*, 47 F.3d at 1235, *Windway*, 2001 U.S. Dist. LEXIS 3430 at *18, *MIT*, 941 F. Supp. at 236, *Greensboro Lumber*, 643 F. Supp. at 1374-75. In this context, the federal court has jurisdiction to force a state to implement QF regulations under PURPA if the state regulatory authority has failed to do so, but not to settle disputes about how a state-approved rate or regulation might apply to an individual QF. *See Windway*, 2001 U.S. Dist. LEXIS 3430 at *20. Paragraph one of PRG's complaint states that it "seeks review against the Texas PUC for its failure to implement a critical and necessary component of PURPA, as required under Section 210(f) of PURPA, 16 U.S.C. § 824a-3(f)." Pl.'s Compl. ¶ 1. Looking at the substance of Plaintiff's complaint, the specific failure PRG is alleging is a failure by the Texas PUC to implement the Legally Enforceable Obligation provision of PURPA in addition to the Time of Delivery provision, which PRG concedes was properly implemented. Thus, from the face of the complaint, Plaintiff has stated a cause of action – purely to enforce the implementation requirements of section 210(f) – and because jurisdiction over this claim is exclusively federal, Defendants' motion to dismiss based on grounds that Plaintiff's claim is barred by the Rooker-Feldman and res judicata doctrines is properly denied.[4]

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[4] It is critical to note here that the Defendants' and Intervenor's citation to *Metro. Edison Co.*, 72 F.E.R.C, ¶ 61,015 (July 6, 1995) as

(Continued on following page)

The collateral estoppel question is slightly more searching because the doctrine will bar issues, irrespective of exclusive federal jurisdiction, if they have been fully and fairly litigated in another forum and were essential to the judgment.[5] *Piggly Wiggly*, 83 F. Supp. 2d at 793. "An issue is 'actually litigated' for collateral estoppel purposes if it is 'properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'" *Id.* In its second amended petition in state court, PRG requested that the District Court: (1) reverse and remand the Texas PUC order which dismissed PRG's complaint; (2) "enter a declaratory judgment that the PUC's application of Substantive Rule § 23.66(d)(1)(C) improperly interferes with and impairs Plaintiff's legal right"; (3) grant specific performance requiring TNMP to purchase energy; (4) award damages for breach of contract; and (5) award damages for fraud. Pl.'s Second Am. Pet., No. 99-06000, Intervenor's Mot. to Dismiss Ex. B.

While it is clear that PRG did argue that Texas rule 23.66 conflicted with PURPA, it appears equally clear that PRG presented the state court with an "as applied" claim, rather than an implementation claim. *See id.* at ¶¶ 14, 22. Application of state regulations is solely and properly the province of the state courts. *See Indus. Cogenerators*, 47 F.3d at 1234. Thus, PRG did not argue

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holding that the timing and creation of a "legally enforceable obligation" is a matter is [sic] state law is inapplicable to the instant implementation question. Application of a state's legally enforceable obligation rule is a matter of state law. However, illegal implementation of PURPA – in the form of a failure to implement a legally enforceable obligation rule which fully effectuates PURPA – is a matter of federal law.

[5] Here, the parties do not dispute that they were cast as adversaries in the state court proceedings.

the implementation issue in the trial court and could not have raised it for the first time on appeal.[6] *See Piggly Wiggly*, 83 F. Supp. 2d at 793-94 ("Importantly, collateral estoppel extends only to matters that were actually adjudicated in an earlier lawsuit and not to matters that might have been raised. . . . This is pivotal because collateral estoppel only precludes the relitigation of *identical* issues of fact or law that were actually litigated.") (emphasis in original). The issue of full PURPA implementation in the State of Texas is, thus, yet to be fully and fairly litigated, and collateral estoppel does not support an argument to dismiss PRG's claim.

However, while the Plaintiff has stated one viable cause of action, it has also included in its complaint claims which are barred. Thorough reading of the Plaintiff's complaint reveals that PRG also asks this Court to grant

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[6] The Texas Court of Appeals held:

> Because we hold that rule 23.66 is not preempted by federal law and the Commission was within its authority to determine that a legally enforceable obligation does not exist unless the qualifying facility is capable of providing energy within ninety days of notifying the utility of its qualifying facility status, we overrule Power Resource's third point of error. Because of our disposition on this point of error, we need not address Power Resource's point of error one, two, four, and five.

Power Res. Group, Inc. v. Pub. Util. Comm'n, 73 S.W.3d at 361-362. Plaintiff's point of error three states, "Rule 23.66 was misinterpreted by the PUC or, otherwise, Rule 23.66 violates governing law and is invalid." Appellant, PRG's Opening Br., Intervenor's Mot. to Dismiss Ex. D. Therefore, in ruling on point of error three exclusively, the Texas Court of Appeal reviewed and determined an "as applied" claim. Moreover, in their arguments to dismiss, Defendants and TNMP focus on points of error two and four – neither of which resulted in a holding by the Texas Court of Appeals.

relief in the form of an order directing the Texas PUC to consider PRG's claims under a revised system of regulation – one conforming to PURPA – and that PRG claims it is entitled to relief because it "has been aggrieved . . . because a legally enforceable obligation arose between PRG and TNMP." Pl.'s Compl. ¶ 3, 60. These allegations state an "as applied" claim, which this Court has no jurisdiction to hear. PRG has fully litigated the ultimate questions of fact related to the proper or improper application of the Texas regulations. PRG argued in state court that the Texas PUC misapplied the state regulations, and that PRG and TNMP had created a legally enforceable obligation. The PUC and the Texas state courts all found that Rule 23.66 was correctly applied to PRG's situation, and that a legally enforceable obligation had not arisen. That determination was distinctly the province of the Texas state courts. 16 U.S.C. § 824a-3(g). This Court has no jurisdiction to review a final determination of the Texas state courts on the application issue. Therefore, the one ultimate and limited issue before this Court is whether the Texas PUC illegally failed to fully implement PURPA.

C. Standing Under § 824a-3(h)(2)(B)

The Defendants argue that PRG has no standing to bring this action under section 210(h)(2)(B) of PURPA because PRG is neither a "qualifying cogenerator, or qualifying small power producer." 16 U.S.C. § 824a-3(h)(2)(B). The procedure for "obtaining qualifying status" is set out in 18 C.F.R. § 292.207, which states, "A small power production facility or cogeneration facility that meets the applicable criteria established in § 292.203 is a qualifying facility." 18 C.F.R. § 292.207(a)(1)(i). PRG was certified as a QF on September 20, 1996 pursuant to 18 C.F.R.

§ 292.207(a)(1), certification number QF 96-120-000. Defendants argue that because PRG was "self-certified", it cannot show standing under section 210(h)(2)(B). The Court disagrees and finds that PRG has standing as a QF to bring this claim. Section 292.207 makes clear that self-certification provides full QF status, and that filing an application for FERC certification, rather than filing a self-certification, is an "Optional procedure." 18 C.F.R. § 292.207(b)(1) ("In lieu of the [self-]certification procedures in paragraph (a) of this section, an owner or operator . . . may file with the Commission an application for Commission certification that the facility is a qualifying facility."). Thus, having been certified as a QF, and having never lost that certification, PRG has standing to bring its implementation claim in this Court, and Defendants' motion to dismiss on that ground is appropriately denied.

D. Sovereign Immunity

As part of their motion to dismiss, the Commissioners argue that PRG's claim is barred by sovereign immunity under the Eleventh Amendment. U.S. CONST. amend. XI. In order to preserve the dual-sovereignty system in the United States, the Eleventh Amendment prevents any suit in federal court "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.* The Eleventh Amendment generally divests federal courts of jurisdiction to entertain suits directed against states. *Green v. State Bar of Texas*, 27 F.3d 1083, 1087 (5th Cir. 1994) (citing *Port Auth. Trans-Hudson Corp. v. Feeney*, 493 U.S. 299, 304, 110 S. Ct. 1868 1871 (1990)). The protection provided by the Eleventh Amendment typically encompasses suits against state officers in their official capacities, like the one at bar,

because the claim remains in essence a claim against the state. *Cox v. City of Dallas*, 256 F.3d 281, 307 (5th Cir. 2001) (citing *Stem v. Ahearn*, 908 F.2d 1, 3 (5th Cir. 1990)).

There is an exception, however, albeit a narrow one. Under the *Ex parte Young* doctrine, suits for prospective injunctive or declaratory relief against state officials acting in their official capacity are permitted when the plaintiff is alleging that the state official is acting in violation of the Constitution or federal law. *Cox*, 256 F.3d at 307 (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). In determining whether an *Ex parte Young* claim avoids the immunity offered by the Eleventh Amendment, a court need only conduct a "straightforward inquiry" into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *Verizon Md.*, 535 U.S. at 636 (citing *Idaho v. Coeur d'alene Tribe of Idaho*, 521 U.S. 261, 296, 298-99, 117 S. Ct. 2028, 2047-48 (1997)). Importantly, the "inquiry into whether [a] suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Id.* at 646 (citation omitted). Thus, generally speaking, a prayer for injunctive and/or declaratory relief, requesting that state officials be restrained from acting in contravention of controlling federal law in the future, satisfies the required "straightforward inquiry." *Id.* at 636.

Here, Plaintiffs have satisfied the "straightforward inquiry" elucidated in *Verizon*. Specifically, the Plaintiffs have brought suit against all Defendants, in their official capacities, requesting prospective injunctive relief requiring these Defendants to fully implement the LEO provision of PURPA in the State of Texas. The relief requested is properly prospective in nature, in that it seeks to

"[r]equire the Texas PUC to implement regulations which give meaningful effect to the Legally Enforceable Obligation Option, as distinct from the Time Of Delivery Option, as defined in 18 C.F.R. § 292.304(d)." Pl.'s Compl. p.12. Thus, the "essential ingredients" of the *Ex parte Young* doctrine are present on the face of Plaintiff's complaint against the Defendants: it is "[1] brought against individual persons [2] in their official capacities as agents of the state and [3] the relief sought [is] declaratory or injunctive in nature and prospective in effect." *Messer v. Meno*, 936 F. Supp. 1280, 1293 (W.D. Tex. 1996). As such, Defendants' motion to dismiss on the ground of sovereign immunity is properly denied.

From the face of the pleadings, Plaintiff appears to have stated a claim which is not precluded and which is properly before this Court. After due consideration, the Court finds the following orders should be entered.

It is therefore ORDERED that TNMP's motion to dismiss and the motion to dismiss amended complaint of PRG brought by Defendants Klein, Parsley and Hudson, with respect to the question of implementation of PURPA in the State of Texas be, and they are hereby, DENIED.

It is further ORDERED that TNMP's motion to dismiss and the motion to dismiss amended complaint of PRG brought by Defendants Klein, Parsley and Hudson, with respect to all questions other than implementation of PURPA in the State of Texas be, and they are hereby, GRANTED.

SIGNED AND ENTERED this 18th Day of February, 2004.

/s/
HARRY LEE HUDSPETH
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX D

PUC DOCKET NO. 19715
SOAH DOCKET NO. 473-98-1765

PETITION OF POWER RESOURCE GROUP, INC. TO REQUIRE TEXAS-NEW MEXICO POWER COMPANY TO PURCHASE CAPACITY AND ENERGY	**§ § § § § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER

This Order adopts the proposal for decision (PFD) issued by the administrative law judge (ALJ) in this docket, with one minor clarification.

I. Findings of Fact and Conclusions of Law

The Commission modifies finding of fact (FoF) 2. In its exceptions, Texas-New Mexico Power Company (TNMP) stated that FoF 2 should be deleted because it did not accurately reflect TNMP's position. Power Resource Group, Inc. (PRG) replied that the finding should not be deleted.

The Commission determines that FoF 2 should not be deleted, but rather should be modified to reflect TNMP's stated position that the Lewisville Power Project (LPP) was not a qualifying facility capable of delivering power because it was neither existing or under construction. Accordingly, pursuant to TEX. GOV'T CODE ANN. § 2003.049(g)(1)(B), the Commission finds that the ALJ's FoF 2 is not supported by a preponderance of the evidence, and must be modified to reflect the record evidence.

All other findings of fact and conclusions of law proposed by the ALJ are affirmed by the Commission and set forth below.

A. Findings of Fact

1. Power Resource Group, Inc. (PRG) filed a petition in this matter on August 7, 1998, requesting the Public Utility Commission of Texas (Commission or PUC) to order Texas-New Mexico Power, Inc. (TNMP) to contract with PRG to purchase energy and capacity from PRG's proposed Lewisville Power Project (LPP), which it alleged was a Qualifying Facility (QF).

2. On August 28, 1998, TNMP filed a Motion to Dismiss PRG's petition. TNMP's motion stated that LPP was not a QF capable of delivering power to TNMP because it was neither existing nor under construction. Therefore, TNMP alleged that it had no legal obligation to contract with PRG to purchase energy and capacity from LPP.

3. On September 16, 1998, General Counsel filed a response to TNMP's motion to dismiss. General Counsel contended that under PUC SUBST. R. 23.66(d)(1)(C), this claim should be dismissed if PRG could not deliver energy and capacity to TNMP from LPP 90 days after PRG gave notice to TNMP in January 1998.

4. The Commission referred this matter to SOAH on September 29, 1998.

5. On October 23, 1998, TNMP filed a Notice of Termination of PRG's Potential Thermal Host. This pleading alleged that the Raytheon Company will close its Lewisville plant by the end of 1999, and that this plant is LPP's proposed thermal host.

6. The Commission issued a Preliminary Order in this matter on November 6, 1998.

7. In September 1996, Lewisville Power Partners (a partnership comprising PRG and Jones Capital Corporation) filed with the FERC a "Notification of Self Certification of Qualifying Status for a Proposed Cogeneration Facility" for the proposed LPP. On September 20, 1996, FERC issued the LPP certification number QF 96-120-000.

8. FERC has not revoked LPP's QF certification.

9. On January 2, 1998, PRG made its final firm offer to supply power and capacity from LPP to TNMP.

10. TNMP rejected PRG's final offer to supply power and capacity from LPP to TNMP.

11. LPP has no plant from which to provide power to TNMP at Lewisville.

12. PRG could not deliver power and capacity to TNMP from LPP within 90 days after its January 2, 1998 final offer.

B. Conclusions of Law

1. The Commission has jurisdiction and authority over this proceeding pursuant to the Public Utility Regulatory Act, Tex. Util. Code Ann., §§ 14.001 and 32.001(b) (Vernon 1999).

2. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Tex. Gov't Code Ann. § 2003.049 (Vernon 1999).

3. LPP has been a Qualifying Facility (QF) under the federal Public Utilities Regulatory Policies Act of 1978 (PURPA) (16 U.S.C. §§ 823a, *et seq.*) at all times since September 1996.

4. The Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction to grant or revoke LPP's QF status.

5. TNMP is not obligated under PUC SUBST. R. 23.66 to contract with PRG to purchase power and capacity from LPP, because PRG could not deliver power or capacity from LPP to TNMP within 90 days after PRG's final offer on January 2, 1998.

6. Based on the Findings of Fact and Conclusions of Law, PRG's petition should be dismissed without prejudice to PRG to refile a petition in the future.

III. Ordering Paragraphs

In accordance with these findings of fact and conclusions of law, the Commission issues the following Order:

1. Power Resource Group, Inc.'s petition is dismissed without prejudice.

2. All other motions, applications and other requests for relief not expressly granted herein are denied.

SIGNED AT AUSTIN, TEXAS the 25th day of March, 1999.

PUBLIC UTILITY COMMISSION OF TEXAS

/s/

PAT WOOD, III, CHAIRMAN

/s/
JUDY WALSH, COMMISSIONER

/s/
BRETT A. PERLMAN, COMMISSIONER

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-50807

POWER RESOURCE GROUP, INC

Plaintiff-Appellant

v.

PUBLIC UTILITY COMMISSION OF TEXAS; BARRY T SMITHERMAN, In his Official Capacity as Commissioner of the Public Utility Commission of Texas; JULIE PARSLEY, Commissioner of the Texas Public Utility Commission; PAUL HUDSON, Chairman of the Texas Public Utility Commission

Defendants-Appellees

TEXAS NEW MEXICO POWER COMPANY

Intervenor Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas, Austin

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ON PETITION FOR REHEARING

(Filed Oct. 19, 2005)

Before GARWOOD, SMITH, and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ E B Clement
United States Circuit Judge

APPENDIX F

Section 3 of the Federal Power Act, 16 U.S.C. § 796, as amended, provides in part:

> The words defined in this Section shall have the following meanings for purposes of this Chapter, to wit:
>
> * * * * *
>
> **(17)(A)** "small power production facility" means a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which –
>
> > **(i)** produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and
> >
> > **(ii)** has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;
>
> **(B)** "primary energy source" means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy –
>
> > **(i)** the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and
> >
> > **(ii)** the minimum amounts of fuel required to alleviate or prevent –
> >
> > > **(I)** unanticipated equipment outages, and
> > >
> > > **(II)** emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) "qualifying small power production facility" means a small power production facility that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe;

(D) "qualifying small power producer" means the owner or operator of a qualifying small power production facility;

(E) "eligible solar, wind, waste or geothermal facility" means a facility which produces electric energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources or geothermal resources; but only if –

(i) either of the following is submitted to the Commission not later than December 31, 1994:

(I) an application for certification of the facility as a qualifying small power production facility; or

(II) notice that the facility meets the requirements for qualification; and

(ii) construction of such facility commences not later than December 31, 1999, or, if not, reasonable diligence is exercised toward the completion of such facility taking into account all factors relevant to construction of the facility.

(18)(A) "cogeneration facility" means a facility which produces –

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) "qualifying cogeneration facility" means a cogeneration facility that the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe;

(C) "qualifying cogenerator" means the owner or operator of a qualifying cogeneration facility;

Section 210 of the Federal Power Act, also known as Title II of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3, as amended, provides in part:

§ 824a-3. Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to –

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting

minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase –

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale –

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 U.S.C.A. § 791a et seq.], from the Public Utility Holding Company Act [15 U.S.C.A. § 79 et seq.], from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the

foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility (other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 796(17)(E) of this title) which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from –

> **(A)** any State law or regulation in effect in a State pursuant to subsection (f) of this section,
>
> **(B)** the provisions of section 210, 211, or 212 of the Federal Power Act [16 U.S.C. § 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act, or
>
> **(C)** any license or permit requirement under part I of the Federal Power Act, any provision

under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory

authority or nonregulated electric utility pursuant to subsection (f) of this section. Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to an action to which section 2633 of this title applies.

(h) Commission enforcement

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) of this section with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act, such rule shall be treated as a rule under the Federal Power Act. Nothing in subsection (g) of this section shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2)(A) The Commission may enforce the requirements of subsection (f) of this section against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f) (1) of this section shall be treated as a rule enforceable under the Federal Power Act. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No enforcement action may be brought by the Commission under this section other than –

(i) an action against the State regulatory authority or nonregulated electric utility for failure

to comply with the requirements of subsection (f) of this section or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

* * * * *

(l) Definitions

For purposes of this section, the terms "small power production facility", "qualifying small power production facility", "qualifying small power producer", "primary energy source", "cogeneration facility", "qualifying cogeneration facility", and "qualifying cogenerator" have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act [16 U.S.C. § 796(17), (18)].

(m) Termination of mandatory purchase and sale requirements

(1) *Obligation to purchase*

After August 8, 2005, no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to –

> **(A)(i)** independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and **(ii)** wholesale markets for long-term sales of capacity and electric energy; or
>
> **(B)(i)** transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or
>
> **(C)** wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

(2) *Revised purchase and sale obligation for new facilities*

(A) After August 8, 2005, no electric utility shall be required pursuant to this section to enter into a new contract or obligation to purchase from or sell electric nergy to a facility that is not an existing qualifying cogeneration facility unless the facility meets the criteria for qualifying cogeneration facilities established by the Commission pursuant to the rulemaking required by subsection (n) of this section.

(B) For the purposes of this paragraph, the term "existing qualifying cogeneration facility" means a facility that –

(i) was a qualifying cogeneration facility on the date of enactment of subsection (m) of this section; or

(ii) had filed with the Commission a notice of self-certification, self recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by subsection (n) of this section.

(3) *Commission review*

Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation pursuant to this subsection on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection have been met. After notice, including sufficient notice to potentially affected

qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) have been met.

(4) *Reinstatement of obligation to purchase*

At any time after the Commission makes a finding under paragraph (3) relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section. Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to purchase electric energy under this section if the Commission finds that the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) which relieved the obligation to purchase, are no longer met.

(5) *Obligation to sell*

After August 8, 2005, no electric utility shall be required to enter into a new contract or obligation to sell electric energy to a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that –

(A) competing retail electric suppliers are willing and able to sell and deliver electric energy to the qualifying cogeneration facility or qualifying small power production facility; and

(B) the electric utility is not required by State law to sell electric energy in its service territory.

(6) *No effect on existing rights and remedies*

Nothing in this subsection affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on August 8, 2005, to purchase electric energy or capacity from or to sell electric energy or capacity to a qualifying cogeneration facility or qualifying small power production facility under this Act (including the right to recover costs of purchasing electric energy or capacity).

(7) *Recovery of costs*

(A) The Commission shall issue and enforce such regulations as are necessary to ensure that an electric utility that purchases electric energy or capacity from a qualifying cogeneration facility or qualifying small power production facility in accordance with any legally enforceable obligation entered into or imposed under this section recovers all prudently incurred costs associated with the purchase.

(B) A regulation under subparagraph (A) shall be enforceable in accordance with the provisions of law applicable to enforcement of regulations under the Federal Power Act (16 U.S.C. 791a et seq.).

(n) Rulemaking for new qualifying facilities

(1)(A) Not later than 180 days after the date of enactment of this section, the Commission shall issue a rule revising the criteria in 18 CFR 292.205 for new qualifying cogeneration facilities seeking to sell electric energy pursuant to this section to ensure –

(i) that the thermal energy output of a new qualifying cogeneration facility is used in a productive and beneficial manner;

(ii) the electrical, thermal, and chemical output of the cogeneration facility is used fundamentally for industrial, commercial, or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as State laws applicable to sales of electric energy from a qualifying facility to its host facility; and

(iii) continuing progress in the development of efficient electric energy generating technology.

(B) The rule issued pursuant to paragraph (1)(A) of this subsection shall be applicable only to facilities that seek to sell electric energy pursuant to this section. For all other purposes, except as specifically provided in subsection (m)(2)(A) of this section, qualifying facility status shall be determined in accordance with the rules and regulations of this Act.

(2) Notwithstanding rule revisions under paragraph (1), the Commission's criteria for qualifying cogeneration facilities in effect prior to the date on which the Commission issues the final rule required by paragraph

(1) shall continue to apply to any cogeneration facility that

(A) was a qualifying cogeneration facility on August 8, 2005, or

(B) had filed with the Commission a notice of self-certification, self-recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by paragraph (1).

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18 C.F.R. part 292 *et seq.*, provides in part:

§ 292.201 Scope

This subpart applies to the criteria for and manner of becoming a qualifying small power production facility and a qualifying cogeneration facility under sections 3(17)(C) and 3(18)(B), respectively, of the Federal Power Act, as amended by section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA).

§ 292.202 Definitions

For purposes of this subpart:

(a) *Biomass* means any organic material not derived from fossil fuels;

(b) *Waste* means an energy input that is listed below in this subsection, or any energy input that has little or no current commercial value and exists in the absence of the qualifying facility industry. Should a waste energy input acquire commercial value after a facility is qualified by way of Commission certification pursuant to § 292.207(b),

or self-certification pursuant to § 292.207(a), the facility will not lose its qualifying status for that reason. Waste includes, but is not limited to, the following materials that the Commission previously has approved as waste:

(1) Anthracite culm produced prior to July 23, 1985;

(2) Anthracite refuse that has an average heat content of 6,000 Btu or less per pound and has an average ash content of 45 percent or more;

(3) Bituminous coal refuse that has an average heat content of 9,500 Btu per pound or less and has an average ash content of 25 percent or more;

(4) Top or bottom subbituminous coal produced on Federal lands or on Indian lands that has been determined to be waste by the United States Department of the Interior's Bureau of Land Management (BLM) or that is located on non-Federal or non-Indian lands outside of BLM's jurisdiction, provided that the applicant shows that the latter coal is an extension of that determined by BLM to be waste.

(5) Coal refuse produced on Federal lands or on Indian lands that has been determined to be waste by the BLM or that is located on non-Federal or non-Indian lands outside of BLM's jurisdiction, provided that applicant shows that the latter is an extension of that determined by BLM to be waste.

(6) Lignite produced in association with the production of montan wax and lignite that becomes exposed as a result of such a mining operation;

(7) Gaseous fuels, except:

(i) Synthetic gas from coal; and

(ii) Natural gas from gas and oil wells unless the natural gas meets the requirements of § 2.400 of this chapter;

(8) Petroleum coke;

(9) Materials that a government agency has certified for disposal by combustion;

(10) Residual heat;

(11) Heat from exothermic reactions;

(12) Used rubber tires;

(13) Plastic materials; and

(14) Refinery off-gas.

(c) *Cogeneration facility* means equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy;

(d) *Topping-cycle cogeneration facility* means a cogeneration facility in which the energy input to the facility is first used to produce useful power output, and at least some of the reject heat from the power production process is then used to provide useful thermal energy;

(e) *Bottoming-cycle cogeneration facility* means a cogeneration facility in which the energy input to the system is first applied to a useful thermal energy application or process, and at least some of the reject heat emerging from the application or process is then used for power production;

(f) *Supplementary firing* means an energy input to the cogeneration facility used only in the thermal process of a topping-cycle cogeneration facility, or only in the electric generating process of a bottoming-cycle cogeneration facility;

(g) *Useful power output* of a cogeneration facility means the electric or mechanical energy made available for use, exclusive of any such energy used in the power production process;

(h) *Useful thermal energy output* of a topping-cycle cogeneration facility means the thermal energy:

(1) That is made available to an industrial or commercial process (net of any heat contained in condensate return and/or makeup water);

(2) That is used in a heating application (e.g., space heating, domestic hot water heating); or

(3) That is used in a space cooling application (i.e., thermal energy used by an absorption chiller)

(i) *Total energy output* of a topping-cycle cogeneration facility is the sum of the useful power output and useful thermal energy output;

(j) *Total energy input* means the total energy of all forms supplied from external sources;

(k) *Natural gas* means either natural gas unmixed, or any mixture of natural gas and artificial gas;

(l). *Oil* means crude oil, residual fuel oil, natural gas liquids, or any refined petroleum products; and

(m) Energy input in the case of energy in the form of natural gas or oil is to be measured by the lower heating value of the natural gas or oil.

(n) *Electric utility holding company* means a holding company, as defined in section 2(a)(7) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(7) which owns one or more electric utilities, as defined in section 2(a)(3) of that Act, 15 U.S.C 79b(a)(3), but does not include any holding company which is exempt by rule or order adopted or issued pursuant to sections 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79c(a)(3) or 79c(a)(5).

(o) *Utility geothermal small power production facility* means a small power production facility which uses geothermal energy as the primary energy resource and of which more than 50 percent is owned either:

(1) By an electric utility or utilities, electric utility holding company or companies, or any combination thereof.

(2) By any company 50 percent or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote by an electric utility, electric utility holding company, or any combination thereof.

* * * * *

(s) *Sequential use of energy* means:

(1) For a topping-cycle cogeneration facility, the use of reject heat from a power production process in sufficient amounts in a thermal application or process to conform to the requirements of the operating standard; or

(2) For a bottoming-cycle cogeneration facility, the use of reject heat from a thermal application or process, at least some of which is then used for power production.

§ 292.203 General requirements for qualification

(a) *Small power production facilities.* Except as provided in paragraph (c) of this section, a small power production facility is a qualifying facility if it:

(1) Meets the maximum size criteria specified in § 292.204(a);

(2) Meets the fuel use criteria specified in § 292.204(b); and

(3) Meets the ownership criteria specified in § 292.206.

(b) *Cogeneration facilities.* A cogeneration facility, including any diesel and dual-fuel cogeneration facility, is a qualifying facility if it:

(1) Meets any applicable operating and efficiency standards specified in § 292.205 (a) and (b); and

(2) Meets the ownership criteria specified in § 292.206.

(c) *Hydroelectric small power production facilities located at a new dam or diversion.*

(1) A hydroelectric small power production facility that impounds or diverts the water of a natural watercourse by means of a new dam or diversion (as that term is defined in § 292.202(p)) is a qualifying facility if it meets the requirements of:

(i) Paragraph (a) of this section; and

(ii) Section 292.208.

(2) [Reserved]

§ 292.204 Criteria for qualifying small power production facilities

(a) *Size of the facility* –

(1) *Maximum size.* There is no size limitation for an eligible solar, wind, waste or facility, as defined by section 3(17)(E) of the Federal Power Act. For a non-eligible facility, the power production capacity for which qualification is sought, together with the power production capacity of any other non-eligible small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.

(2) *Method of calculation.*

(i) For purposes of this paragraph, facilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought and, for hydroelectric facilities, if they use water from the same impoundment for power generation.

(ii) For purposes of making the determination in clause (i), the distance between facilities shall be measured from the electrical generating equipment of a facility.

(3) *Waiver.* The Commission may modify the application of paragraph (a)(2) of this section, for good cause.

(b) *Fuel Use.*

(1)(i) The primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.

(ii) Any primary energy source which, on the basis of its energy content, is 50 percent or more biomass shall be considered biomass.

(2) Use of oil, natural gas and coal by a facility, under section 3(17)(B) of the Federal Power Act, is limited to the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and the minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages, and emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages. Such fuel use may not, in the aggregate, exceed 25 percent of the total energy input of the facility during the 12-month period beginning with the date the facility first produces electric energy and any calendar year subsequent to the year in which the facility first produces electric energy.

§ 292.205 Criteria for qualifying cogeneration facilities

(a) *Operating and efficiency standards for topping-cycle facilities* –

(1) *Operating standard.* For any topping-cycle cogeneration facility, the useful thermal energy output of the facility must be no less than 5 percent of the total energy output during the 12-month period beginning with the date the facility first produces electric energy, and any

calendar year subsequent to the year in which the facility first produces electric energy.

(2) *Efficiency standard.*

(i) For any topping-cycle cogeneration facility for which any of the energy input is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility plus one-half the useful thermal energy output, during the 12-month period beginning with the date the facility first produces electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy, must:

(A) Subject to paragraph (a)(2)(i)(B) of this section be no less than 42.5 percent of the total energy input of natural gas and oil to the facility; or

(B) If the useful thermal energy output is less than 15 percent of the total energy output of the facility, be no less than 45 percent of the total energy input of natural gas and oil to the facility.

(ii) For any topping-cycle cogeneration facility not subject to paragraph (a)(2)(i) of this section there is no efficiency standard.

(b) *Efficiency standards for bottoming-cycle facilities.*

(1) For any bottoming-cycle cogeneration facility for which any of the energy input as supplementary firing is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility during the 12-month period beginning with the date the facility first produces electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy must be no less than 45

percent of the energy input of natural gas and oil for supplementary firing.

(2) For any bottoming-cycle cogeneration facility not covered by paragraph (b)(1) of this section, there is no efficiency standard.

(c) *Waiver.* The Commission may waive any of the requirements of paragraphs (a) and (b) of this section upon a showing that the facility will produce significant energy savings.

§ 292.206 Ownership criteria

(a) *General rule.* A cogeneration facility or small power production facility may not be owned by a person primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

(b) *Ownership test.* For purposes of this section, a cogeneration or small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric utility holding company, or companies, or any combination thereof. If a wholly or partially owned subsidiary of an electric utility or electric utility holding company has an ownership interest of a facility, the subsidiary's ownership interest shall be considered as ownership by an electric utility or electric utility holding company.

(c) *Exceptions.* For purposes of this section a company shall not be considered to be an "electric utility" company if it:

(1) Is a subsidiary of an electric utility holding company which is exempt by rule or order adopted or issued pursuant to section 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79c(a)(3), 79c(a)(5); or

(2) Is declared not to be an electric utility company by rule or order of the Securities and Exchange Commission pursuant to section 2(a)(3)(A) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(3)(A).

§ 292.207 Procedures for obtaining qualifying status

(a) *Self-certification and pre-authorized Commission recertification* –

(1) *Self-certification.*

(i) A small power production facility or cogeneration facility that meets the applicable criteria established in § 292.203 is a qualifying facility.

(ii) The owner or operator of a facility or its representative self-certifying under this section must file with the Commission, and concurrently serve on each electric utility with which it expects to interconnect, transmit or sell electric energy to or purchase supplementary, standby, back-up and maintenance power, and the State regulatory authority of each state where the facility and each affected utility is located, a notice of self-certification which contains a completed Form 556.

(iii) Subsequent notices of self-recertification for the same facility may reference prior notices or prior Commission certifications, and need only refer to changes which

have occurred with respect to the facility since the prior notice or the prior Commission certification.

(iv) Notices of self-certification or self-recertification will not be published in the Federal Register.

(2) *Pre-authorized Commission recertification.*

(i) For purposes of paragraph (b) of this section, the following alterations or modifications are not considered substantial alterations or modifications and will not result in revocation of qualifying status previously granted by the Commission pursuant to paragraph (b) of this section:

(A) A change which does not affect the upstream ownership of the facility;

(B) A change in the installation or operation date;

(C) A change in the manufacturer of the power generation equipment selected for the facility's installation when there is no change in capacity or operating characteristics;

(D) A change in the location of a cogeneration facility, or a small power production facility, if the new location would not cause the facility to violate the 80 MW limitation of § 292.204(a)(1);

(E) A decrease in the amount of natural gas or oil or any change in the amount of other fuel used by a cogeneration facility, provided that the efficiency value and the operating value calculation for the facility remain at or above the values stated when the certification or recertification order was issued;

(F) A decrease in the amount of fossil fuel used by a small power production facility;

(G) A change in the primary energy source of a small power production facility, provided that the facility continues to comply with the requirements of § 292.204;

(H) An additional use of a cogeneration facility's thermal output, if the original uses are as stated when the certification order was issued;

(I) An increase in the efficiency value of a cogeneration facility or an increase in the operating value of a cogeneration facility determined in accordance with § 292.205;

(J) A decrease in the power production capacity of a small power production facility;

(K) A change in the power production capacity of a cogeneration facility if the efficiency value and the operating value calculation for the facility remain at or above the values stated when the certification or recertification order was issued; or

(L) A change in the purchaser of the cogeneration facility's thermal output, when there is no change in the specified thermal application or process.

(ii) The owner or operator of a qualifying facility that has been certified under paragraph (b) of this section must file with the Commission notice of each change listed in this subsection, and must concurrently serve a copy of such notice on each electric utility with which it expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up and maintenance power, and the State regulatory authority of each state where the facility and each affected electric utility is located.

(b) *Optional procedure –*

(1) *Application for Commission certification.* In lieu of the certification procedures in paragraph (a) of this section, an owner or operator of a facility or its representative may file with the Commission an application for Commission certification that the facility is a qualifying facility. The application must be accompanied by the fee prescribed by part 381 of this chapter.

(2) *General contents of application.* The application must include a completed Form 556.

(3) *Commission action.*

(i) Within 90 days of the later of the filing of an application or the filing of a supplement, amendment or other change to the application, the Commission will either: inform the applicant that the application is deficient; or issue an order granting or denying the application; or toll the time for issuance of an order. Any order denying certification shall identify the specific requirements which were not met. If the Commission does not act within 90 days of the date of the latest filing, the application shall be deemed to have been granted.

(ii) For purposes of paragraph (b) of this section, the date an application is filed is the date by which the Office of the Secretary has received all of the information and the appropriate filing fee necessary to comply with the requirements of this Part.

(4) *Notice.* The applicant must include a form of notice of the application suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d) of this chapter. The form of notice shall be on electronic media as specified by the Secretary.

(c) *Notice requirements for facilities of 500 kW or more.* An electric utility is not required to purchase electric energy from a facility with a design capacity of 500 kW or more until 90 days after the facility notifies the utility that it is a qualifying facility, or 90 days after the facility has applied to the Commission under paragraph (b) of this section.

(d) *Revocation of qualifying status.*

(1)(i) If a qualifying facility fails to conform with any material facts or representations presented by the cogenerator or small power producer in its submittals to the Commission, the notice of self-certification of the qualifying status of the facility, pre-authorized Commission re-certification notice, or Commission order certifying the qualifying status of the facility may no longer be relied upon. At that point, if the facility continues to conform to the Commission's qualifying criteria under this part, the cogenerator or small power producer may file either a notice of self-recertification of qualifying status pursuant to the requirements of paragraph (a)(1) of this section, a pre-authorized Commission recertification notice pursuant to the requirements of paragraph (a)(2) of this section, or an application for Commission recertification pursuant to the requirements of paragraph (b) of this section, as appropriate.

(ii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a facility that has been certified under paragraph (b) of this section, if the facility fails to conform to any of the Commission's qualifying facility criteria under this part.

(iii) The Commission may revoke the qualifying status of a self-certified qualifying facility upon the filing

of a petition for a declaratory order that the self-certified qualifying facility does not meet applicable requirements for qualifying facilities.

(2) Prior to undertaking any substantial alteration or modification of a qualifying facility which has been certified under paragraph (b) of this section, a small power producer or cogenerator may apply to the Commission for a determination that the proposed alteration or modification will not result in a revocation of qualifying status. This application for Commission recertification of qualifying status should be submitted in accordance with paragraph (b) of this section.

* * * * *

§ 292.301 Scope

(a) *Applicability.* This subpart applies to the regulation of sales and purchases between qualifying facilities and electric utilities.

(b) *Negotiated rates or terms.* Nothing in this subpart:

(1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or

(2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.

* * * * *

§ 292.303 Electric utility obligations under this subpart.

(a) *Obligation to purchase from qualifying facilities.* Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility:

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

(b) *Obligation to sell to qualifying facilities.* Each electric utility shall sell to any qualifying facility, in accordance with § 292.305, any energy and capacity requested by the qualifying facility.

(c) *Obligation to interconnect.*

(1) Subject to paragraph (c)(2) of this section, any electric utility shall make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart. The obligation to pay for any interconnection costs shall be determined in accordance with § 292.306.

(2) No electric utility is required to interconnect with any qualifying facility if, solely by reason of purchases or sales over the interconnection, the electric utility would become subject to regulation as a public utility under Part II of the Federal Power Act.

(d) *Transmission to other electric utilities.* If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from

such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e)(4) and shall not include any charges for transmission.

(e) *Parallel operation.* Each electric utility shall offer to operate in parallel with a qualifying facility, provided that the qualifying facility complies with any applicable standards established in accordance with § 292.308.

§ 292.304 Rates for purchases

(a) *Rates for purchases.*

(1) Rates for purchases shall:

(i) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and

(ii) Not discriminate against qualifying cogeneration and small power production facilities.

(2) Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.

(b) *Relationship to avoided costs.*

(1) For purposes of this paragraph, "new capacity" means any purchase from capacity of a qualifying facility, construction of which was commenced on or after November 9, 1978.

(2) Subject to paragraph (b)(3) of this section, a rate for purchases satisfies the requirements of paragraph (a) of this section if the rate equals the avoided costs determined after consideration of the factors set forth in paragraph (e) of this section.

(3) A rate for purchases (other than from new capacity) may be less than the avoided cost if the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or the nonregulated electric utility determines that a lower rate is consistent with paragraph (a) of this section, and is sufficient to encourage cogeneration and small power production.

(4) Rates for purchases from new capacity shall be in accordance with paragraph (b)(2) of this section, regardless of whether the electric utility making such purchases is simultaneously making sales to the qualifying facility.

(5) In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.

(c) *Standard rates for purchases.*

(1) There shall be put into effect (with respect to each electric utility) standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.

(2) There may be put into effect standard rates for purchases from qualifying facilities with a design capacity of more than 100 kilowatts.

(3) The standard rates for purchases under this paragraph:

(i) Shall be consistent with paragraphs (a) and (e) of this section; and

(ii) May differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.

(d) *Purchases "as available" or pursuant to a legally enforceable obligation.* Each qualifying facility shall have the option either:

(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

(e) *Factors affecting rates for purchases.* In determining avoided costs, the following factors shall, to the extent practicable, be taken into account:

(1) The data provided pursuant to § 292.302(b), (c), or (d), including State review of any such data;

(2) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:

(i) The ability of the utility to dispatch the qualifying facility;

(ii) The expected or demonstrated reliability of the qualifying facility;

(iii) The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance;

(iv) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities;

(v) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;

(vi) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and

(vii) The smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities; and

(3) The relationship of the availability of energy or capacity from the qualifying facility as derived in paragraph (e)(2) of this section, to the ability of the electric

utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

(4) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity.

(f) *Periods during which purchases not required.*

(1) Any electric utility which gives notice pursuant to paragraph (f)(2) of this section will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself.

(2) Any electric utility seeking to invoke paragraph (f)(1) of this section must notify, in accordance with applicable State law or regulation, each affected qualifying facility in time for the qualifying facility to cease the delivery of energy or capacity to the electric utility.

(3) Any electric utility which fails to comply with the provisions of paragraph (f)(2) of this section will be required to pay the same rate for such purchase of energy or capacity as would be required had the period described in paragraph (f)(1) of this section not occurred.

(4) A claim by an electric utility that such a period has occurred or will occur is subject to such verification by its State regulatory authority as the State regulatory

authority determines necessary or appropriate, either before or after the occurrence.

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§ 292.601 Exemption to qualifying facilities from the Federal Power Act.

(a) *Applicability.* This section applies to qualifying facilities, other than those described in paragraph (b) of this section.

(b) *Exclusion.* This section does not apply to a qualifying small power production facility with a power production capacity which exceeds 30 megawatts, if such facility uses any primary energy source other than geothermal resources.

(c) *General Rule.* Any qualifying facility described in paragraph (a) of this section shall be exempt from all sections of the Federal Power Act, except:

(1) Section 1-18, and 21-30;

(2) Sections 202(c), 210, 211, 212, 213, and 214;

(3) Sections 305(c); and

(4) Any necessary enforcement provision of Part III with regard to the sections listed in paragraphs (c)(1), (2) and (3) of this section.

§ 292.602 Exemption to qualifying facilities from the Public Utility Holding Company Act and certain State law and regulation.

(a) *Applicability.* This section applies to any qualifying facility described in § 292.601(a), and to any qualifying small power production facility with a power production

capacity over 30 megawatts if such facility produces electric energy solely by the use of biomass as a primary energy source.

(b) *Exemption from the Public Utility Holding Company Act of 1935.* A qualifying facility described in paragraph (a) of this section or a utility geothermal small power production facility shall not be considered to be an "electric utility company" as defined in section 2(a)(3) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(3).

(c) *Exemption from certain State law and regulation.*

(1) Any qualifying facility shall be exempted (except as provided in paragraph (c)(2)) of this section from State law or regulation respecting:

(i) The rates of electric utilities; and

(ii) The financial and organizational regulation of electric utilities.

(2) A qualifying facility may not be exempted from State law and regulation implementing Subpart C.

(3) Upon request of a State regulatory authority or nonregulated electric utility, the Commission may consider a limitation on the exemptions specified in paragraph (c)(1) of this section.

(4) Upon request of any person, the Commission may determine whether a qualifying facility is exempt from a particular State law or regulation.